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CONVEYANCER'S NOTEBOOK.

In one of our contemporaries an otherwise friendly reviewer of our last volume complained that it was " dull ". While the editors have never set out to rival *Punch* such a criticism could not escape our notice and has caused some searchings of the heart, since contrary to some speculations editors are afflicted with that organ.

After a good many years' experience of practical conveyancing we confess that the lighter side of conveyancing seems to offer little material for publication. There is naturally not a little humour to be found in this as in all aspects of life, but it is usually too personal for publication. Conveyancers' jokes are apt to have a very intimate character. It is difficult, for example, to retail odd provisions in wills without the fear of giving offence or disclosing professional secrets.

Like its humour the romance of conveyancing belongs to the office files and cannot easily be brought out without the danger of some breach of confidence. The story that ended with the solicitor remarking : " Yes, gentlemen, I believe that is possible in law but not in this office; there is the door ", could scarcely be set out in full. It is no doubt one of the reasons why many not experienced in the art think the life of a conveyancer must be dull compared with the rich experiences that flow through the Common Law reports. Yet there is real romance in the conveyancer's life if it is viewed in the correct light. It is, no doubt, the business of the conveyancer to keep his client out of Court, but families may be built up and happiness in some measure at least depends upon the wisdom and accuracy of his dispositions.

It is a wise testator who consults his solicitor about his proposed dispositions and does not merely give directions. It is a wise solicitor who will look into the future and contemplate possibilities as well as actualities. We were told some years ago of a woman who was proposing to leave a life interest to her husband and then her property to be divided equally between her children. " Don't do that ", remarked the solicitor, a family friend : " I know nothing more calculated to have a bad influence on children than the knowledge that they are sure of a small income ". She followed the advice. Whether it was good or bad is not here material, but it forms part of the romance of conveyancing. It is practical romance with its armoury of discretionary

trusts and powers of appointment, its wills and settlements and powers of revocation and all the panoply of the conveyancer's art. But surely it is no more matter of fact than " romance brings up the 9.15 ".

If any of our subscribers have anecdotes of humour or romance that they can supply for these columns they will be welcome indeed. Nevertheless, we feel that the essential romance with which we are here concerned is the intellectual adventure in moulding the law to the needs of the client. For this purpose it is necessary often to reproduce the dull leadenness of legislation that restricts or develops the rights of the individual. We have always tried, however, notwithstanding that the legislative floodgates stand wide open, to include some matters of a less matter of fact character. The law of conveyancing has not for hundreds of years been the easiest of sciences to master, but at least there remains much pleasurable intellectual adventure in pursuit of it. This must represent our main purpose, but we would be glad to receive contributions in lighter vein.

The pitfall of charity.—On another page we note a case, which was nearly a charity (*Re Hobourn Aero Components, etc.* (1946), 115 L. J. Ch. 50) that is a warning of the difficulties that beset what a contributor in an earlier volume called " quasi-charities ". A fund raised for the purpose of relief against air-raid distress was, in the particular circumstances, held to be not charitable. The learned Judge directed that the subscriptions, collected over a period, should be returned to the subscribers with certain deductions in certain cases. Such a course would often entail difficulty in funds collected from many subscribers. Nevertheless the habit of collecting funds for purposes, frequently ill-defined and many of them of doubtful charity, seems to be steadily on the increase.

We need hardly point to the steady stream of cases noted in this periodical which show how difficult it is to determine whether objects are necessarily charitable unless the purposes are defined very carefully. In our observation it is just these cases of subscription, public or quasi-public, where the purposes are most often left vague, sometimes intentionally left vague. There is no merit in vagueness unless there is a general intention of charity. Thus, gifts to build endow or help towards founding a particular institution may fail if the particular gift cannot be accomplished notwithstanding that the institution would be charitable: see *Re London University Medical Sciences Fund*, [1909] 2 Ch. 1 and cases there cited. Of course if a general intention of charity can be spelled out the fund will be applied *cy-près*, but in fact in so many of these subscription cases there is no general intention of charity but merely a desire to benefit one object no matter how loosely defined.

It is most unfair on benefactors and trustees that trusts are not properly drawn and adequate provision made for the disposal of funds on more than one contingency. This becomes more imperative than ever with the uncertainty that hangs over so many operations at the present day. We feel that so far as they can, on committees and elsewhere, practitioners should urge the necessity for dealing with these

matters in a proper legal manner. Drafting is not easy because in practice precedents are hard to come by and each case is apt to present new features, but these difficulties only call out the conveyancer's art.

Local land charges—Town Planning Act, 1944—registration of orders.—The Town, etc., Planning Act, 1944 (Registration of Orders) Rules, 1945 (1945, No. 1677/L.24) which have just been issued bring a reminder that under the Act there are two provisions for registration as a land charge.

These rules provide for a new part of the Register to be known as Part VI and for the form in which orders made in compliance with section 1 of the Act are to be registered : see section 17. These orders are the declaratory or compulsory purchase orders. The registration is to be subject to the ordinary rules for official searches : that is to say a search of other parts of the register may include Part VI, but, of course, there may be a search of Part VI only in which case the prescribed fee is 2s. It is possible to have a personal search.

One of the peculiarities of section 17 of the Act is that, though it prescribes the necessity for the registration of such orders, it does not state the effect of failure to register. This is the more remarkable because under section 33, where an order is made suspending an existing scheme in order to vary it or create a new scheme, this order must also be registered and it is provided (by referential legislation to section 15 of the Land Charges Act) that the order would not bind a purchaser if it is not registered.

The absence of any similar provision with regard to section 17 would presumably prevent the order from being void against a purchaser. Possibly Parliament has assumed that what a local authority official has been directed to do will be done. Since, however, it is human to err it would be interesting to see whether a purchaser, suffering damage from failure to register, could bring a Common Law action for damages for breach of statutory duty against the local authority. In the meantime the rules are a further reminder of the necessity of searching for local land charges prior to completion of the contract.

War damage appeals.—The War Damage (Valuation Appeals) Act, 1945, is a very short Act designed to substitute a new panel and tribunal for appeals which under the 1943 Act lay to a referee appointed under Part I of the Finance (1909–10) Act, 1910. The new panel is to consist of a President who is to be a barrister of not less than seven years standing and other members who are either barristers of seven years standing or persons who have had experience in the valuation of land. The President is to select from the panel the person or persons who is or are to constitute the tribunal for any appeal or group of appeals. On a point of law appeal lies from the tribunal to the High Court or, where the amount does not exceed £500 and the party so elects, to the county court. In order that such an appeal

should be made the party must, immediately after the determination by the tribunal, declare its dissatisfaction and within limits of time laid down by rules, require the tribunal to state and sign a case for the Court. Costs may be awarded by the tribunal.

In point of fact this Act seems to go far to making appeals from the War Damage Commission analogous to legal proceedings and dealt with by lawyers.

Rent and purchase price of certain houses.—The Building Materials and Housing Act, 1945, is mainly concerned with finance for new building by the Government and local authorities. The Act, however, does contain two general provisions of importance in sections 7 and 8. By section 7 it becomes an offence to let or sell or agree to let or sell beyond a certain price or rent a house built under a housing permit granted under any Defence Regulation where the permit contains a condition restricting the selling price or rent. The section (subsection (8)) contains express provision that the commission of a summary offence shall not affect the title to any property or the operation of any contract. Presumably an innocent purchaser could get specific performance of the contract notwithstanding that it must aggravate the offence! We feel that this provision will need interpretation should the point arise. Section 8, however, provides that any such condition should be registered as a local land charge. Now it has been held that registration of a local land charge must be treated as actual notice: Law of Property Act, 1925, s. 198; *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, and see *Coles* v. *White City, etc., Assn.*, 45 T. L. R. 230. If a purchaser is deemed to have notice it is difficult to see how he can be innocent. It is not, however, an offence to buy or take to rent the house, but would a purchaser or tenant with notice be deemed to be a party to the summary offence? The Act contains provisions designed to enable the Court to determine what is the real price or rent and to avoid evasions by the use of benefits or considerations other than money.

It will be noted that this is the third new local land charge we have had occasion to notice in this number. It emphasises the importance of any search prior to contract where the property is sold by private treaty and aggravates the difficulties of solicitors with clients naturally anxious to clinch any contract to purchase. If it is difficult in the case of sales by private treaty it becomes impossible in auction sales. It is manifestly impossible for any possible bidder to search before sale. In our view the law requires immediate reform, the more so that the number of local land charges is not likely to become less, and this reform should take one of two forms. Either registration as a land charge should not be actual notice to a purchaser and he should not be required to search prior to contract but only prior to completion or a vendor should be compelled to disclose all registered local land charges and failure to do so should make the contract voidable. In our view the latter is the proper provision to make. In the meantime specific questions can always be put prior to contract in private treaty. As we have said the essential problem lies in the realm of auction sales.

Restraint on anticipation.—It may be convenient to remind practitioners that where a will comes into operation after January 1, 1946, any restraint on anticipation thereby imposed is ineffective. The Law Reform Act, 1935, did not destroy restraints imposed prior to 1936 nor did it affect restraints contained in wills *executed* prior to 1936 provided that the will came into operation prior to 1946. So a will executed in 1936 containing a restraint would not be effective to impose the restraint though the testator died in 1938, while a will executed in 1934 would be effective if the testator died in 1945. It is at least an advantage that this anomalous position is now gone, but practitioners might do well to overhaul any old wills of clients that they have in their safes *if and when* they have time. The passing of the restraint has meant the increase of discretionary trusts. Discretionary trusts are in fact more effective than a restraint and can be imposed on male and female alike. Many testators do not like them, but if their effectiveness on tax questions as well as restraint is explained they are sometimes like Oliver Twist and ask for more. Where provision is being made for a mother and unmarried daughters who may both need financial help there is a good deal to be said for the discretionary trust. By sharing the income between the parties the various tax reliefs are increased. On the other hand if any child marries and ceases to need the income it can then be paid to the mother alone or as the case may be.

SOME FREQUENT FAULTS OF OMISSION AND COMMISSION IN THE DRAFTING AND EXECUTION OF WILLS.

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Of all legal documents wills, on the whole, are the worst drafted. Various factors combine to bring this about : the idiosyncrasies of the testator, the incidence of taxation, the lapse of time between drafting and operation, the fact that wills are often drawn in one department of a solicitor's office whereas estates are administered in another, and so on. It is impossible to consider all contingencies, but the draftsman should endeavour not merely to reproduce clearly and accurately his instructions but also to avoid stultifying the testator's wishes through the operation of factors which are unknown to him but can reasonably be foreseen.

A large proportion of wills follow much the same lines : executors are appointed, various bequests and legacies are made and the residue is given to the testator's family. The widow is provided for by an annuity, a life interest or an absolute interest in part of the residue or a combination of these three. Subject to this, the property is given to, or settled on, the issue of the marriage. Even in such a simple case, the drafting of the will needs careful consideration.

Provision for the Widow.

In deciding how to provide for the widow it should be borne in mind that special provision has been made with respect to estate duty on

property passing on the cesser of a surviving spouse's interest. Where estate duty has once been paid in respect of any settled property on the death of one of the parties to a marriage it is not payable on the death of the other party, provided that the settlement remains in force and the spouse dying last did not at any time during the continuance of the settlement become competent to dispose of the property (Finance Acts, 1894, s. 5 (2); 1898, s. 13; 1914, s. 14 (a)). So where in the normal way property might be given to a wife absolutely in the expectation that she would in her turn leave it to the children of the marriage, the property thus bearing estate duty again on her death, the testator's attention should at least be drawn to the saving of duty which would result under the provisions mentioned by giving her a life interest only, with a gift over to the children on her death.

The testator may object to this course on the ground that the income may prove insufficient and, in the past, this contingency has been met by a power to raise capital for the widow's benefit. The provision of a life interest coupled with a right to have the income made up to a particular annual sum by resort to capital should be avoided at all costs, as income tax under a Rule 21 assessment on the amount so raised will be payable (*Brodie's Trustees* v. *I. R.* (1933), 17 Tax Cas. 432), *i.e.*, if £100 is paid to the widow out of capital under such a provision a further £100 at present rates of income tax has to be paid to the Inland Revenue. The effect is exactly the same where the trustees are merely given a discretion to make the income up to a particular annual sum if they think fit (*Lindus* v. *I. R.* (1933), 17 Tax Cas. 442) and in the recent case of *Cunard's Trustees* v. *I. R.*, [1946] 1 A. E. R. 159, the Court of Appeal held that the same principle applied to a case where the testatrix gave her trustees a discretionary power, if in any year the income of the residuary estate should not be sufficient to enable the life tenant to live in her customary degree of comfort, to apply capital of the residue "by way of addition to the income". Citing these words, Lord Greene, M.R., said (at p. 163): "The testatrix was in fact providing for a defined standard of life for her sister, that provision being made in part out of income and in part (at the discretion of the trustees) out of capital. The purpose was an income purpose and nothing else".

It can hardly be supposed that this decision covers literally every case where capital is raised by trustees so as to make the amount so raised taxable as income; for example, we have never heard it suggested that an advancement under the statutory power should be treated as income and taxable accordingly. It seems that the test of liability to tax is whether or not the purpose of the application of capital is "an income purpose", to quote Lord Greene's phrase. It is clear, therefore, that where a power to raise capital is inserted there should be no suggestion that any capital to be so raised is to be used for "an income purpose", but, on the contrary, the power should be given in general terms. If the testator only wishes the power to be used in extraordinary circumstances, it will be well expressly to limit the exercise of the power accordingly, and so to cut down the possibility of being brought within the scope of *Cunard's Trustees* v. *I. R.*, *supra*.

It seems, then, that the best course is to give the widow a pecuniary legacy coupled with a life interest in the residue. A power to raise

capital for her benefit to be exercised in exceptional circumstances should be added, though it seems inadvisable to make any reference in the will to the times when it is to be exercised. The saving of estate duty on the widow's death under such a provision would clearly outweigh the loss by way of income tax (if in fact chargeable) if capital were only resorted to occasionally; and if the trustees determined to hand over the whole of the capital to the widow, surely the Revenue could not contend that the fund was to be treated as income of the widow in the year of transfer? In this way the position of the widow is as good as if the testator had given her an absolute interest in the first place, while saving duty if capital is not in fact raised.

If the widow is given a life interest in part only of the residue there seems no objection to giving the trustees power to raise capital for her benefit out of the other part, together, if desired, with a corresponding power to raise capital out of the widow's share of residue in favour of the other beneficiaries.

If the widow is to be given an annuity, this should be done *simpliciter*, the effect of which will be that the annuity will be paid out of the income of the general residuary estate. The insertion of a power for the trustees to set aside a sum to cover the annuity, with power to resort to the capital of this sum if required, a provision not infrequently inserted, should be avoided, except in very special circumstances, as the objections to raising capital above considered apply to the case of such a provision. Again, if the trustees are directed to purchase the annuity the testator is, in effect, doing nothing more than giving her a pecuniary legacy calculated in a particular manner.

Although the personal representatives cannot be compelled to start paying an annuity before the end of a year from the death, in practice they will, wherever possible, act upon a direction to start payments earlier.

Provision for Infant Children

Where the testator's widow is given a life interest in the residuary estate, consideration should be given to the benefits which will accrue by giving to each infant child an annuity to be paid out of, and as a first charge upon, the income. Where the testator is a man of moderate means each child can be given an annuity of an amount not exceeding £50 without taking away the widow's right to an allowance in respect of the child for the purposes of her own income tax; at the same time the annuity would be tax free in the infant's hands. The annuity can be paid to the widow to be used for the infant's maintenance, education or benefit or applied by the trustees themselves for these purposes (Trustee Act, 1925, s. 31), so that the widow's position is not in fact prejudiced by the cutting down of her actual income. There is no reason why the annuity should not be limited to the infancy of each child if this is desired.

In the case of a testator whose estate is such that the widow will be a surtax payer the benefit to be obtained from giving the children annuities is even more marked. If the annuity to the child exceeds £50, the widow loses the child's allowance in respect of her income tax, but, on the other hand, the annuity will not bear surtax as it would do if it formed part of the widow's income.

In deciding upon provision for infant children attention should

be concentrated on powers of maintenance and advancement. A wide power of advancement for the benefit of infant beneficiaries should be given. The powers given by the Trustee Act, 1925, s. 32, are to-day not generally wide enough. The cost of education is now a heavy burden and one is frequently asked whether trustees under the statutory power can pay school fees or other educational expenses. We have not been able to find any case deciding whether education is properly the subject of an advancement; as it is a recurring expenditure it is submitted that, in general, it ought to be treated as the subject of maintenance, though payment for a vocational training, as for training to become a doctor or a dentist, may properly be regarded as the subject of an advancement. To put matters beyond doubt, where infants are concerned, there should be an express power to raise money for their advancement, maintenance, education or benefit.

Where the interests of the infant are subject to a prior life interest in the fund the power of advancement given by section 32 can only be exercised with the consent of the person entitled to that life interest and, in any event, the power only extends to one-half of the infant's vested, contingent or presumptive share. It may be that the testator would wish to extend the power to cover the whole of the share, at any rate where the fund in question is likely to be small or to be diminished in any way.

SETTLEMENT OF CHILDREN'S SHARES.

Where the testator's children are grown up he sometimes feels he would like to tie up their shares by giving to each of them a life interest in a share of residue, with remainder to their children on attaining twenty-one, followed by cross-gifts to the other children in default of his or her having issue who attain a vested interest. In view of the low net return that is obtained on capital to-day the effect of settling shares in this way deprives the children of substantial benefit from the settled property. Another objection is that on the cesser of each life interest estate duty has to be paid and the rate of duty depends on the amount of all the property passing on the life tenant's death. Thus, if one-half of a fund is given to A for life, then to his children and, in default of children, on the trusts affecting the other half, and the other half is given to B on similar trusts and B predeceases A without leaving children estate duty is payable as follows: on one-half of the fund on B's death and on the whole of the fund on A's death.

Some modification of the burden of estate duty could be made in the example above given by providing that in default of issue of any child that child's share is to go, not to the other children for life, but directly to their issue. Even better provision could be made by means of a wide discretionary trust; for in such a case no estate duty becomes payable during the continuance of the trust so long as the group of beneficiaries does not change on a death (*Burrell* v. *Att.-Gen.*, [1937] A. C. 286).

The decision in *Cunard's Trustees* v. *I. R.*, *supra*, must be borne in mind if a power to raise capital is inserted.

Apportionment Rules.

On the testator's death the various equitable rules designed to ensure fairness between the life tenant and remaindermen come into play: the rules in *Howe* v. *Dartmouth* (1802), 7 Ves. Jun. 137, *Chesterfield's Case* (1883), 24 Ch. D. 643, and *Allhusen* v. *Whittell* (1867), 4 Eq. 295. These rules rarely commend themselves to practising lawyers, and testators are blissfully ignorant of their existence. Even where there is a power to postpone the conversion of property held on trust for sale an adjustment must be made between capital and income by treating any income in excess of 4 per cent. from unconverted property as capital (*Re Beech*, [1920] 1 Ch. 40). Often the expense and trouble of apportionment is quite out of proportion to any alleged benefit. Again, on the death of a life tenant, an apportionment of income between the remaindermen and the life tenant's estate must be made. In spite of almost universal agreement that the rules in *Howe* v. *Dartmouth* and *Chesterfield's Case* should be excluded, often they are not.

The question of excluding the rule in *Allhusen* v. *Whittell* is not so simple. If the liabilities of the testator, as where he is a merchant, are likely to be really substantial and to take a long time to discharge, it may be unfair that perhaps for two or three years the life tenant should receive an income substantially in excess of that received thereafter. In such a case it may be that a provision for setting aside a specific and easily realisable part of the estate and its income to cover the debts would cover the point more simply.

In excluding the rules as to apportionment it is inadvisable to refer in terms to the rules, as involved explanations to the client are necessary; a more roundabout clause should be inserted, such as the following:—

> I declare that as from the date of my death all income from my estate shall be treated and applied as income from whatever source or class of investment or property the same shall arise and even if the property in respect of which the income arises is sold for the payment of my debts or for other purposes and whatever the period may be in respect of which the income shall have accrued and that no property not actually producing income shall be treated as producing income.

Gifts to Charities.

A glance at the law reports will show that gifts to charities or for charitable purposes are often ill-drawn. Charities are all too commonly misdescribed; in any case of doubt their names can be ascertained by inquiry from the Charity Organisation Society.

If there is doubt as to whether an organisation is a charity, an out-and-out gift can always be made provided the organisation can immediately dispose of it. If there is no restriction as to the user of the gift, so that the property is in no way tied up, there is no tendency to a perpetuity and thus the gift is unobjectionable (*Re Prevost*, [1930] 2 Ch. 383).

SPECIFIC GIFTS AND PECUNIARY LEGACIES.

Specific gifts and pecuniary legacies generally present little difficulty; the draftsman merely has to make it quite clear who the beneficiary is, what he is to take and the order of priority. Where there are a number of small gifts of personal effects the testator can give them all to a near relative with a request that he shall distribute them according to his instructions, the will making it quite clear that there is no trust. In this way the length of the will is cut down, the instructions can be altered from time to time and the legacy duty will probably only be 1 per cent. or 5 per cent. instead of the 10 per cent. payable by a stranger.

Where the gifts are numerous care should be taken to see that the position of the principal beneficiaries, who are usually the residuary legatees, is safeguarded. Few testators can foresee what the net residuary estate is likely to amount to, and it is sometimes advisable to give substantial pecuniary legacies to the principal beneficiaries in priority to all other gifts.

Where investments are given as specific gifts the possibility of ademption must be borne in mind; this can in cases of doubt best be overcome by a demonstrative legacy, a form of gift which is not very common: here the beneficiary is given an amount of the security "out of" the testator's holding. The sale of the holding before death will not defeat the gift which will have to be purchased out of the residuary estate.

DEATH DUTIES.

The 1925 legislation assimilated the law relating to real and personal property for most purposes, but a notable exception was made with respect to death duties (Law of Property Act, 1925, s. 16 (4)). Real property bears its own estate and succession duty and this may bring about unintended results. First, where real property is given to a beneficiary "free of duties", it amounts to a legacy of the amount of the estate and succession duties and legacy duty thereon is payable. If it is intended that the beneficiary is to take the property entirely unburdened by duties there will have to be a further provision, normally in the clause dealing with the residuary estate, for the payment of this legacy duty. So, also, in the case of leaseholds given free of succession duty, in the absence of contrary provision, the beneficiary will have to bear the legacy duty on the succession duty. *Aliter*, in the case of property given free of legacy duty, as it is specifically provided that a gift of legacy duty does not itself bear legacy duty (Legacy Duty Act, 1796, s. 21).

Secondly, assuming that there is no partial intestacy the pecuniary legacies (including any annuities) will, in the absence of contrary intention in the will, come out of the residuary estate. If the residuary estate consists partly of personalty and partly of realty, the legacies must still be paid primarily out of personalty (*Re Thompson*, [1936] Ch. 676, where it was held that the Administration of Estates Act, 1925, had made no difference to this rule which obtained before 1926). If the realty has to be resorted to, the legatees will have to bear the estate duty on the realty so resorted to (see *Re Anstead*, [1943]

Ch. 161). If a mixed fund is created as it normally is by a provision that after payment of debts, legacies, etc., the residuary realty and personalty shall be distributed to, or held in trust for, the residuary legatees, the pecuniary legacies are thrown rateably on the residuary realty and personalty, thus casting part of the burden of the estate duty upon the legatees. It is usually the testator's intention that the legacies shall be free of all duties and that each legatee should actually receive the sum mentioned in the will without any deduction. Accordingly, it is not always sufficient to give the legacies free of legacy duty; it should be specifically provided, where realty will have to be resorted to, that the residuary estate is to bear the estate and succession duty on the real as well as the personal estate.

Beneficiaries under gifts and settlements *inter vivos* made within three years of the death and *donationes mortis causa* are personally liable for the estate duty (as the property does not pass to the personal representatives as such) and, in the latter case, legacy duty also, and the testator's estate is not liable. Provision should be made to throw such duties on the testator's residuary estate.

Form of Trust.

Where a trust is being created under a will the draftsman should have clearly in mind what is intended. In the case of land it must be either a strict settlement or a trust for sale. In the case of personalty it may be a trust to retain or convert, or a trust for sale, with or without a power to postpone sale, or, in the case of residue, a trust of the residue without any mention of conversion.

It is hardly necessary to-day to draw the draftsman's attention to the creation of a strict settlement by accident. If there is no immediate binding trust for sale of land it is the subject of a strict settlement; but a trust either to retain or sell land is now to be construed as a trust for sale with power to postpone (Law of Property Act, 1925, s. 25 (4)). Thus, where a house was given to trustees upon trust to permit the testator's widow to reside there and, at the widow's request, to sell, a strict settlement was created as the trust for sale was not immediate (*Re Hanson*, [1928] Ch. 96). Generally, it is as convenient to create a trust for sale as a strict settlement even where the land is to be retained, as where the testator wishes the widow to have the property as a residence; in such a case, the power of sale will during the widow's lifetime be exercisable only with her consent and the proceeds of sale could be directed or permitted to be invested in another residence to be approved by the widow.

Where there is a trust of the residue without any mention of conversion, the rule in *Howe* v. *Dartmouth* (1802), 7 Ves. Jun. 137, will compel conversion of non-trustee or unauthorised securities. Generally the choice lies between a trust to retain or convert and a trust for sale with power to postpone. The difference between them is one of emphasis; in the latter case the primary trust is to convert and, unless all the trustees agree to retain, the property must be converted. There seems no reason to assume that the testator would normally desire to have investments selected by him sold. Hence a trust to retain or convert is generally to be preferred, especially as it gives a wider discretion to the trustees.

INVESTMENT CLAUSE.

The range of investments to be permitted is a matter needing especial attention to-day. Trustee investments for the whole of a trust fund, with their extremely low return, are manifestly unsatisfactory; at the very least a power to buy land should be included. Where land is held on trust for sale it is provided by the Law of Property Act, 1925, s. 28, that the proceeds of sale of the land may be reinvested in the purchase of land. Where it is intended that the widow, or someone else, shall reside in a house held on trust for sale, it might be thought that this power would be sufficient, but it was held in *Re Wakeman*, [1945] Ch. 177, that if at any time the trust property ceases to include any land the statutory power disappears. Accordingly, in all cases a specific power to buy land should be included and, indeed, it is submitted very strongly that the very widest power of investment, the power to invest as though the trustees were beneficial owners, should be inserted. After all, they need not use the powers to invest in unsafe stocks; if the powers are wide it merely means that the trustees should be selected with greater care.

APPOINTMENT OF EXECUTORS AND TRUSTEES.

Usually the same persons are appointed executors and trustees. If they are given wide discretionary powers, as they should be, they should be chosen from persons likely to consider the family's affairs carefully. At least two persons should be appointed, and where there are trusts which may continue for some time more than two are desirable. Changes of trustees are expensive where the trust fund is spread over a number of securities and, if there are four trustees, normally it will be many years before fresh appointments will be required. On the other hand, there is never any disadvantage in appointing a number of executors, as one or two can prove, power being reserved to the other or others. The common form of appointing the principal beneficiaries and the family solicitor as executors is eminently satisfactory, as the solicitor can keep a balance between the different interests while the expense of administration is in no way increased.

The appointment of a corporation as executor raises a very vexed question. It is true that there is no fear of the corporation changing from the family solicitors save in exceptional circumstances, that there is no fear of a breach of trust which cannot be made good and that the expense of appointing new trustees is avoided; but, on the other hand, the corporation's fees have to be added to the legal expenses and the conservative and impersonal attitude of a corporation means an unimaginative administration and makes the conferring of wide discretionary powers a waste of time. The corporation may be admirable for the rigid, stereotyped trust, but is hopeless for the type of trust modern conditions call for. If a corporation incorporated outside England is appointed it must be appointed sole executor, for such a corporation cannot apply for probate, but only for administration by an attorney, and there are no means whereby a grant can be made to an administrator and an executor. There is nothing, of course, to prevent its being appointed one of the trustees.

Executorial and Trustee Clauses.

In general the 1925 legislation gives personal representatives and trustees sufficient powers for most ordinary purposes and special clauses need not normally be inserted in the will. But, as we have suggested above, the power of advancement should be extended. Further, the power of appropriation given by the Administration of Estates Act, 1925, s. 41, is not entirely satisfactory: the consent of the beneficiary, or of someone on his behalf if he is not *sui juris*, is required and *ad valorem* stamp duty is payable on conveyances or transfers executed to give effect to the appropriation. If a specific power of appropriation without anyone's consent is given by the will no duty is payable (*Re Beverly*, [1901] 1 Ch. 681).

The testator should be advised to insert a charging clause even if none of the executors and trustees is a professional person; it is often very difficult to find new trustees if there is no power to charge.

Miscellaneous Clauses.

It is not common to see the appointment of a guardian of the testator's infant children in a will, but it is a matter which needs consideration. The testator may well provide that the appointment is not to take effect till the death of the mother or, if he wishes, is to take effect only in default of the surviving mother appointing one.

It was largely to avoid double death duties that the *commorientes* clause was introduced, but for some reason it was not commonly inserted in wills before 1939. The object of the clause is twofold: first, the difficulty of proving that a beneficiary survived the testator so as to prevent a lapse, the onus of proof of which is on the person claiming under the beneficiary (*Underwood* v. *Wing* (1855), 24 L. J. Ch. 297), is overcome; and, secondly, double death duties are avoided. Road accidents make the clause as necessary in peace time as in war and it is suggested that at the end of each will a general clause should be inserted that no beneficiary should take any interest thereunder unless he survive the testator by, say, a month and that any person not so surviving should be deemed to predecease the testator.

Under the Wills Act, 1837, ss. 32 and 33, in the case of gifts of entailed interests and of certain gifts to the testator's issue where the beneficiary predeceases the testator he is deemed to survive the testator so as to prevent a lapse. It should not be overlooked that the effect of the sections is not merely to prevent a lapse, but to make the gift part of the predeceasing beneficiary's estate (but in the former case only if he has barred his entailed interests by his will) so that the property passes under his will or on his intestacy. Further, the notional postponement of the death has the effect of making the property subject to double death duties (*Re Scott*, [1901] 1 K. B. 228). The draftsman should always provide specifically what is to happen in the event of a beneficiary predeceasing the testator.

Lastly, where the testator has made, or is likely to make, advances to his children during his lifetime it should be made clear whether they are or are not to be brought into hotchpot, as in the absence of contrary intention (either in the will or elsewhere) they must be.

EXECUTION.

Strict proof of a will is rarely necessary, but its possibility should not be overlooked. Where the will is not executed in the solicitor's office careful instructions as to execution should be given, at least one of the witnesses should be easily traceable and a person to whom the testator is well known, not, *e.g.*, a domestic servant, and the solicitor should see the will after execution to be sure of proper execution and to complete his draft. Lengthy attestation clauses seem to be a relic of old-fashioned drafting and the following one is short enough to be easily remembered: "Signed by the testator in our presence and by us in his".

CUSTODY.

Wills should be kept where they can be discovered and this is not always the solicitor's office. If the client is a casual one the solicitor may not hear of his death; in such a case the client's bank seems to be the best place. If no other satisfactory place can be thought of the will could be deposited at the Principal Probate Registry for a fee of 15s. or at a District Registry for £1. There are some irksome conditions attaching to such a deposit, but there may be a few cases when the advantages outweigh the disadvantages.

SUMMARY.

It is not suggested that where the estate is likely to be small a long, complicated will covering all possible contingencies should be drawn. Testators like short wills and the draftsman should make a judicious selection from the technical devices at his disposal of those which can most appropriately be incorporated. Once trusts are introduced a properly drawn will is bound to be of some length as the possibility of each beneficiary predeceasing the testator must be covered. It may be useful to summarise the principal points dealt with above.

1. In the case of a surviving spouse, a saving of estate duty is effected by giving him or her a life interest only. In all other cases the gift of a life interest has the effect of making estate duty payable on the death of the life tenant, the estate duty being calculated on the whole of the property passing on the life tenant's death and not merely on the value of the fund passing. Hence life interests likely to be of short duration, as in the case of cross-gifts among brothers and sisters of shares settled on them, should be avoided as far as possible.

2. Where a share is given to an infant the widest powers of advancement should be given, in particular a power to raise capital for education. Instead of giving a life interest in the whole of the residue to the widow, the gift of a small annuity to each child and of the balance of the income to the widow may well be made, as it is more beneficial; and the same argument applies to other trusts in favour of a person for life and then his children.

3. The very widest powers should be given to the executors and trustees who should accordingly be chosen with care from individuals who are familiar with the family interests. The powers of investment should always cover the purchase of land at the very least. The residuary estate should be held on trust to retain or convert rather

than to convert with power to postpone sale as a general rule and especially so if the investment clause is not widely drawn. Although a power to raise capital must often be exercised with caution because of the danger of income tax becoming payable in respect thereof, it should always be inserted for use in emergency.

4. Where land forms part of the estate care must be taken to see that death duties are properly dealt with. Specific provision should be made to throw death duties in respect of the land on to the residuary estate even where gifts and legacies have been specifically given free of duty. Where land is given free of estate and succession duty the gift of the duty is a legacy which bears legacy duty unless this also is thrown on the residuary estate. The residuary estate should also bear the death duties on gifts and settlements *inter vivos* made within three years of the death and *donationes mortis causa*.

5. All apportionment rules should be excluded.

6. Where there is a gift to a child of the testator specific provision should be made to cover lapse and the matter should not merely be left to be covered by the Wills Act, 1837, s. 33, which operates for all purposes as though the predeceasing child died after the testator and which is of limited application, not applying, for example, to a class gift.

7. A *commorientes* clause may well be included automatically at the end of every will.

RENTS IN THE SETTLED LAND CURTAIN.

Shortly before the beginning of the war, Mr. A. H. Withers, writing in the *Solicitors' Journal* (*a*), expressed some cogent doubts concerning the effectiveness of the "curtain" provided by section 110 of the Settled Land Act to cover the provisions of the trust instrument. Mr. Albery in this journal (*b*) offered a reply, but preoccupation with more immediate concerns left the matter there. Return to more normal conditions and the certainty of a considerable increase in conveyancing make some further consideration of the problem worthy of attention.

The property legislation of 1925, except so far as concerned concurrent interests in land, made no greater innovation than that concerned with settlements. Indeed, it seems true to say that the primary object lay in this material alteration in the law. Its purpose was achieved by dividing equitable interests affecting the legal estate into two classes, namely, those interests which would bind the legal estate in the hands of purchasers by virtue of registration as land charges: see section 198 of the Law of Property Act, 1925, cf. *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, and those interests which would always be overreached by a conveyance to a purchaser: see section 2 of the Law of Property Act, 1925. The more effectively to achieve this object all successive interests in land (other than a right

(*a*) Vol. 83, pp. 45 *et seq.*
(*b*) Vol. 4, pp. 203 *et seq.*

of entry) became equitable and the Statute of Uses was repealed. A purchaser cannot disregard equities of the former kind, and the problem lies with his right and duty to disregard equities of the latter kind.

The trust created by section 16 of the Settled Land Act does not of itself entitle a purchaser to disregard the right of the estate owner to exercise powers which he may claim to be vested in him. Unlike trustees for sale (cf. *Re Chafer and Randall's Contract*, [1916] Ch. 8; *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258) the estate owner is a trustee who has only powers and, apart from express statutory provision, a purchaser would be concerned to see that the powers he claims are his and do not belong to somebody else. What is more, he cannot exercise such powers save in favour of a purchaser without notice, except where there is a vesting instrument (Settled Land Act, s. 13). Consequently, to have notice of a settlement is to have notice that the powers conferred upon estate owners can only be exercised where the circumstances allow it. The persons who have these powers are defined by sections 19 and 20 of the Settled Land Act with certain additional provisions to cover cases not within those sections as, for example, to include statutory owners under section 23, cases not always easy to determine: cf. *Re Gallenga*, [1938] 1 A. E. R. 106; *Re Jefferys*, [1939] Ch. 205. *Prima facie*, therefore, a purchaser would be concerned to see that a vendor was, by the terms of the trust instrument, the person entitled to these powers. Since trustees are normally also necessary to these transactions, *prima facie* a similar burden is placed on a purchaser to ensure that the correct trustees are involved. This, again, may not be a simple matter, as shown by *Re Thomas*, [1939] Ch. 503.

Now it was primarily the object of this property legislation to eliminate precisely the type of inquiry which has been set out above, and it would be expected that the elaborate machinery of vesting instruments, declarations of appointment of new trustees and endorsements, and deeds of discharge within section 17 of the Settled Land Act would be so designed and protected as to achieve this object. Their effectiveness depends primarily upon section 110 of the Act and the interpretation thereof, but this cannot be divorced from the general tenor of the decisions on relevant sections elsewhere in this legislation. The importance of the matter is great because, to make assurance doubly sure, section 18 of the Settled Land Act provides that if there is a vesting instrument any unauthorised transaction is void. And first a word should be said on this.

It is thought that hitherto much too little emphasis has been placed upon the trusteeship of the estate owner. We have had occasion to note this in this journal in connection with decisions on waste (see *Re Harker's Will Trusts*, [1938] Ch. 323, vol. 8, p. 233; *Re Fitzwalter*, [1943] Ch. 385, vol. 8, p. 106), but so far the matter has been looked at primarily from the point of view of enjoyment and not of disposition. It is suggested that an estate owner, apart from section 18, may have unlimited powers of disposition at law, but that by reason of trusteeship no grantee other than a purchaser of the legal estate without notice could take the legal estate except subject to the trusts of the settlement. The effect of

section 18, therefore, is *prima facie* twofold: first, it operates to prevent a legal as well as a beneficial interest from passing where there is notice, and secondly, it prevents the purchaser of the legal estate without notice from being in a better position than anyone else. This would operate, in fact, to put the powers of disposition into much the same position as was enjoyed by a limited owner prior to 1926 under the Settled Land Acts, 1882–90. It is submitted that with this background the Courts would so interpret the expression "void" in section 18 and not give it the meaning "voidable" suggested as possible by Mr. Albery. This view would be supported by the provisions of section 18 permitting dispositions of the equitable interest, but here a different principle is to be observed from the old law. A disposition made by an estate owner as such and void as such does not operate against any equitable interest of the estate owner under the trust instrument since his capacity is different: *Re Liberty's Will Trusts*, [1937] Ch. 176. Therefore, in all cases within the Settled Land Act it is of the utmost importance to ensure that the disposition is authorised, and it is submitted that this includes the necessity of seeing that the grantor is the person having the appropriate powers of disposition.

The real issue, therefore, is whether there can be at the same time two or more persons severally entitled to the powers of an estate owner under the Settled Land Act, namely, A because he falls within section 19, and B because by chance he happens to have a vesting instrument vesting the property in him notwithstanding that he is not entitled to the powers under any section of the Act. The same issue arises with regard to the trustees. The answer, which is usually given, is that in effect this is the result of section 110 of the Act, subject to a few exceptions which are usually only taken to include settlements created before 1926. We do not think that the problem is so simple as that and there are two principal reasons why this is so. First, the language of the relevant provisions is not on analysis so unambiguous that it is incapable of more than one construction, and secondly, the general construction put upon the Acts regarding exclusion of notice of settlements has not followed this strait and narrow way. For the purpose of background we will pursue first the second principle, if indeed it be a principle.

(1) *Decisions tend to enforce equities.*

From the point of view of the curtain, perhaps, the most startling blow that has been struck so far is the decision in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, which most practitioners regard as a convenience. Where, as so frequently happens in small settlements, no proper practice has been carried out, it certainly does sometimes have that effect. Upon general principle, however, the practice is disastrous. In effect this decision holds, as one of the two grounds on which the learned Judge based his judgment, that where a settlement has in equity come to an end on the death of the existing estate owner, the legal estate vests in the general personal representatives of the deceased estate owner, at any rate where there is no exception of settled land contained in the grant to the general personal representatives.

It is to be noted that the learned Judge did not hold, indeed the then practice of the Probate Registry would not have enabled him to hold, that where there is no exception of settled land contained in the general grant, settled land that does not cease to be settled land passes to the general personal representative notwithstanding section 22 of the Administration of Estates Act, 1925. It is submitted that if an estate owner must be deemed to have appointed the trustees of the settlement as his special personal representatives, then the legal estate must vest in them and not the general personal representatives notwithstanding the absence of any exception of settled land (*bb*).

Whether the other head of the *ratio decidendi* in *Re Bridgett and Hayes' Contract* (*supra*), namely, the protection afforded to a purchaser by an order of the Court, would entitle a purchaser to disregard the existence of a settlement which in fact had not come to an end is another matter. To some extent this aspect of the question is dependent on section 110 (3), which certainly assumes that the legal estate will be in the trustees where it ought to be. In any event *Re Bridgett and Hayes' Contract* (*supra*) does not cover the point. It was concerned simply with a case where the settlement had, in fact, come to an end and where, indeed, no vesting deed had ever been executed.

Now, therefore, it is submitted that, unless future decisions go further than *Re Bridgett and Hayes' Contract* (*supra*), a purchaser is bound to concern himself with the settlement to see whether or not it has come to an end. Unless it has, in fact, come to an end, the form of the grant of representation will not protect a purchaser from the general personal representatives. We think that this is so notwithstanding that the trustees acquiesce in a general grant and procedure under it. If the settlement has come to an end, a purchaser may further be concerned to know whether or not it has come to an end in a very common way, namely, by the remainder vesting beneficially in persons entitled in undivided shares. In view of *Re Cugny's Will Trusts*, [1931] 1 Ch. 305, it is the trustees of the settlement who should take out the grant, but in *Re Thomas*, [1939] Ch. 503, in the event of intestacy it was assumed that letters of administration vest the legal estate in general personal representatives, at any rate if there is no exception of settled land, but they hold it on trust to convey it to the trustees. If a purchaser has notice that there is a settlement and that it is claimed to come to an end can he disregard altogether these possible trusts? It is possible that he can, as the personal representative has all the powers of a trustee for sale holding upon an effectual trust for sale: Administration of Estates Act, 1925, s. 39; but it is difficult to see why. In fact, the position is contradictory. Either settled land must be dealt with as settled land or else it need not—to seek the best of both worlds is to end in confusion.

Apart from these decisions affecting the continuance of a settlement the powers of personal representatives to give a clear title received a rude shock in *Re Duce and Boots' Contract*, [1937] Ch. 642. Here an assent, which by a recital disclosed a state of affairs constituting

(*bb*) This is perhaps one of the most difficult of the problems dealt with in this article. For another interpretation of the position and the reason for S. L. A., s. 110 (3) see 79 Solicitors Journal 243, where a different conclusion is reached. The effect of a grant not necessarily including any particular property seems to be obscure.

settled land, did not pass the fee simple as it purported to do notwithstanding section 36 (6) of the Administration of Estates Act, 1925, and a purchaser from the person taking under the assent was held bound to inquire into the trusts of the will. It is true that this decision turned upon the learned Judge's refusal to allow that the words "sufficient evidence" contained in the section were synonymous with "conclusive evidence", but it should be noted, first, that personal representatives give no more value than persons taking under an assent, and secondly, that under the scheme of the Acts it is just as important to keep wills off the title as it is to curtain off trust instruments.

The treatment of the trust for sale by the Courts, so far as it operates to exclude the Settled Land Act, is consistent also with this unwillingness to exclude a purchaser from inquiry. It has been held repeatedly that an immediate trust for sale binding upon the trustees (the immediate binding trust for sale of the old Settled Land Acts, 1882–90: *Re Goodall's Settlement*, [1909] 1 Ch. 740) is not necessarily a binding trust for sale so as to exclude the Settled Land Act under sub-section (7) of section 1 of that Act. And it is thought that a purchaser from the trustees, at least so long as he had actual notice of an outstanding equity, could never get protection by reason of section 4 of the Settled Land Act which requires the settlement to be in a certain form. This brings us naturally to a further complication in freeing the estate from the effect of notice of trusts where a settlement exists which is created by the Settled Land Act itself. Section 4 of the Act specifies the form in which a settlement shall be made, and section 110 (2), proviso (d), excludes a purchaser from protection where the first vesting deed is executed for the purpose of giving effect to a settlement not made in that form. We will give a simple illustration of the difficulty from a case which has twice come to our notice.

A enters into a contract to sell land, reserving to himself the right to continue to reside on the land during his life. The contract is registered as an estate contract and completion is not effected. This clearly constitutes settled land. By virtue of section 9 (1) (iii) this informal settlement is required to be effected by special provisions which include the execution of the principal vesting deed by the trustees of the settlement, and if there are none then an application shall be made to the Court, and *apparently* these provisions are compulsory. The vital question here is whether section 9 and section 110 (2), proviso (d), can be avoided by the execution by the person in whom the legal estate is vested of a principal vesting deed and by the removal of the estate contract from the Land Charges Register. In such circumstances it plainly is against the express words of the statute to pass a legal estate. The reasoning is as follows: (a) unless there are two deeds the settlement is effected in a way which will not operate to transfer or create a legal estate, and (b) a contract for sale is not made by deed, and (c) any vesting instrument should be executed in accordance with section 9 and, therefore, apart from compliance with section 9 and inquiry concerning the settlement the purchaser should not get a good title.

Now the importance of this example in connection with notice rests in this. Can the consequences of an informal settlement, at least *vis-à-vis* a purchaser, be avoided by ignoring section 9? Suppose

the person making the informal grant, *e.g.*, the contract for sale just mentioned, then executes a vesting instrument in the ordinary form referring to the trusts of an instrument therein specified, *i.e.*, the contract of sale, is the purchaser protected?

It is submitted that on any rational interpretation of the Act this vesting instrument would not exclude the obligation of inquiry. Section 110 (2) proviso requires this investigation wherever "the first vesting instrument [is] executed for the purpose of giving effect to . . ." Now whether or not the principal vesting instrument be executed by the owner of the legal estate it will be "for the purpose of giving effect to . . ." an instrument falling within paragraph (c) or (d) of that proviso, and, therefore, the purchaser will be put upon inquiry concerning the relevant facts specified in that proviso, which, of course, are the relevant facts for the exercise of the power of sale or other statutory powers. But if a purchaser is put on inquiry in that case, whatever the form of the vesting instrument, how then is he excluded from inquiry in every case concerning the character of the trust instrument to ensure that sections 4 and 5 have been complied with? There is no provision in the proviso that where a purchaser does not know or have notice of the existence of the facts stipulated by the proviso then he shall not be bound to inquire.

(2) *Various notice provisions.*

This case applies only to the creation and not to the continuance of the settlement. It is conceivable that the Act has in fact resulted in separate provision for these two cases, but before proceeding further it will be convenient to gather up the threads of the notice provisions.

Section 13 provides that the powers cannot be exercised concerning the legal estate *once* there is a settlement (*i.e.*, an instrument or state of affairs giving a person the powers of a tenant for life) *until* the execution of a vesting instrument. This section is expressly made subject to notice. A *bona fide* purchaser of the legal estate will override a trust instrument. The impact of notice has already been referred to in connection with *Re Duce and Boots' Contract*, [1937] Ch. 642. Parenthetically it may be remarked that the saving in favour of purchasers of the legal estate does not affect the case we have last discussed because we have postulated a vesting instrument and consequently section 13 no longer applies.

Once there is a vesting deed the disposition must be authorised by virtue of section 18, and it will be observed that the statutory powers are only conferred upon certain persons. Other persons in whom the legal estate may be vested have not these powers by statute. What is more, these powers are conferred by reference to equitable interests and not by reference to the legal estate. Under section 16 (1) (i) the estate owner is a trustee for the persons entitled under the settlement, so that a purchaser has notice of the existence of such trusts and, apart from the statute, cannot take free from them, quite apart from any statements in the trust instrument.

Under section 16 (2) a mortgagee or chargee under a mortgage takes as if he had no notice provided that the mortgage or charge is expressed to be made pursuant to the section. Under the same section the estate owner must create a legal estate in priority to the settlement

in favour of any person entitled to an estate in such priority. It is also provided (section 16 (8)) that the section does not affect a purchaser of a legal estate taking free from any equitable interest or power, but it is conceived that this sub-section does not entitle a purchaser from any person in whose favour a legal estate has been created to disregard the trusts of the settlement, unless the other provisions of the Act have been complied with. For example, if by virtue of an exercise of a power of appointment A becomes entitled to part of the land in equity free from all other charges, etc., under the settlement, he can compel the estate owner to convey the legal estate to him. In order, however, to get a title on which a purchaser could rely A should obtain the joinder of the trustees of the settlement to give a discharge under section 17 and then rely upon sub-section (3) of that section.

Section 17 (3) provides that, where a discharge contains no statement to the contrary, a purchaser is entitled to assume that the land has ceased to be settled land and is not subject to any trust for sale. This was clearly intended to be the normal method of discharging the trusts of the settlement and so freeing the estate owner from the obligations under section 16 (1) (i) and consequently a purchaser from any further inquiry. It does not protect a purchaser who relies on the vesting instrument being a proper instrument, but normally the legal estate will be in the estate owner. It also only protects a purchaser when it is executed by the persons named as trustees in the last principal vesting instrument or deed of declaration annexed thereto.

In section 35, which concerns the deed of declaration of new trustees, sub-section (3) provides that statements contained in the deed concerning unwillingness or incapacity to act of the person declared to have power to appoint and the absence, unfitness, etc., of a trustee are to be conclusive evidence in favour of a legal estate. The section, curiously enough, does not provide that the deed is conclusive evidence either of the power of the person named in the vesting instrument, etc., to appoint, nor that the persons named as appointed have been appointed. It is to be borne in mind that the deed is *not* an appointment but a declaration that the trustees *have* been appointed. The purchaser is left to rely on section 110 (2) (d) for the validity of the appointment other than in respect of the precise points mentioned in sub-section (3). What is odd is that section 110 (2) (d) is perfectly general and, therefore, if it is to be relied upon at all it is hard to see why sub-section (3) was necessary, but it must be *assumed* to be necessary (*c*). This assumption would lead logically to the conclusion that the general terms of section 110 (2) (d) was open to exceptions.

We may now turn to section 110 since most of the other provisions protecting purchasers are not concerned with the validity or the capacity of the estate owner or trustees, but with the validity of an exercise of a power otherwise valid. Section 110, on examination, turns out not to be a homogeneous section. It deals with three types of case. First, it concerns itself with the validity of the exercise of a power; secondly, it provides some protection against the wrong estate

(*c*) Actually it seems little more than a repetition of the Trustee Act, 1925, s. 38 (1), though why it was thought desirable to insert it remains a mystery.

owner or trustees; and thirdly, it affords some protection under a disposition by personal representatives. These are apparently three separate cases, but in every example the protection is afforded to a "purchaser". The purchaser, however, is not always similarly described. Under sub-section (1) he is "a purchaser dealing in good faith with a tenant for life or statutory owner"; in sub-sections (2) and (3) he is "a purchaser of a legal estate in settled land"; in sub-sections (4) and (5) he is "a purchaser of a legal estate". The definition of "purchaser" in fact requires him to be a purchaser "in good faith for value": section 117 (1) (xxi).

(3) *What is "good faith"?*

The Act does not define "good faith", but the importance of these words is nevertheless obvious. An example came the writer's way not long since where no fresh vesting instrument was executed after the death of the first tenant for life. A few years later a disposition in favour of the settled land was made in which both the next tenant for life and the trustees were joined as grantees, but no vesting instrument was executed. One of the trustees having died the sole surviving trustee contracted to sell as surviving special personal representative. Could a purchaser be said to be acting "in good faith" if he ignored all these facts and the limited power to dispose vested in special personal representatives under section 7 (1)? It was clear that the administration had come to an end, but need a purchaser regard that?

It will be remembered that in *Le Neve* v. *Le Neve*, 3 Atk. 646, Lord Hardwicke held that notice was sufficient *mala fides* to alter the effect of the express words of a statute relating to the registration of a memorial in the Middlesex Deeds Registry. This decision went further, no doubt, than would any modern decision on a statute, but surely the words "in good faith" must mean something. "A purchaser in good faith", as known in Courts of equity, certainly has not meant only a purchaser who has not been guilty of fraud in any real sense of the term "fraud".

Curiously enough the point has received little attention in connection with section 54 of the Settled Land Act, 1882. It was suggested in *Mogridge* v. *Clapp*, [1892] 3 Ch. at p. 395, by Lindley, L.J., that "the doctrines of constructive notice ought not to be applied so as to invalidate the titles of persons dealing *bona fide* with tenants for life"; but this really begs the question. Kay, L.J., in the same case (at p. 401) said: "Good faith in that connection must mean or involve a belief that all is being regularly and properly done; and if the lessee has not that belief, it may be said that section 54 of the Act of 1882 does not protect him. . . ." These statements were accepted by Stirling, J., in *Chandler* v. *Bradley*, [1897] 1 Ch. at pp. 322, 323. In *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599, the Court of Appeal refused to force on a purchaser a title derived from a grant of a lease not *bona fide* notwithstanding that the actual vendor was himself a *bona fide* purchaser without notice. *Hurrell* v. *Littlejohn*, [1904] 1 Ch. 689, supports the view that mere constructive notice is inadequate, because a subsequent resale at a greatly enhanced price was not sufficient evidence that the purchaser had acted otherwise than in good faith. In our opinion the important feature is that the Settled

Land Act, 1925, requires a number of things to be done both to constitute the settlement and to carry it out. In our view knowledge directly or indirectly obtained that something is not being regularly done constitutes lack of *bona fides*.

It is, therefore, submitted that " in good faith " when attached to the word " purchaser " in this connection includes the refusal to recognise or total disregard altogether of obvious irregularities at least. For example, where, for any reason, it is known to the purchaser that the estate owner has ceased to have the right to the powers of a tenant for life, if, for instance, he has become bankrupt and his life tenancy was held on protective trusts, we think that a purchaser would not be protected in taking a conveyance from him. The difficulty is to know where to stop.

It is clear that notice is not excluded until a vesting instrument is executed : section 13. This, of course, is subject to the special protection afforded to assents made under a will by section 36 (7) of the Administration of Estates Act, 1925, but this protection is limited : *Re Duce and Boots' Contract*, [1937] Ch. 642.

It seems equally clear that notice is not excluded if the settlement comes to an end otherwise than by a deed of discharge or, possibly, by an assent under section 110 (3) (5) from a personal representative disposing of " settled land ". It is submitted that a personal representative disposing of settled land must be a special personal representative and not a general personal representative : Administration of Estates Act, 1925, s. 22; Judicature Act, 1925, s. 162; though it is by no means clear on the authorities how exactly these provisions are to be construed : see *In the estate of Gibbings*, [1928] P. 28; *In the estate of Taylor*, [1929] P. 260; *In the estate of James*, 162 L. T. J. 498; *Re Thomas*, [1939] Ch. 513. Before it is possible to offer any more definite opinion concerning the *end* of a settlement we must examine the protection afforded during the time when a legal estate is vested in an estate owner named in a vesting instrument. This clearly falls within section 18 of the Settled Land Act which begins, " Where land is the subject of a vesting instrument and the trustees of the settlement have not been discharged under this Act . . ." It provides that any disposition by a " tenant for life or statutory owner " not authorised by the Act will be void.

(4) *Protection for the exercise of powers.*

Section 110 (1) provides that a purchaser " dealing in good faith " with a tenant for life or statutory owner shall be conclusively taken to have given the best price and complied with all the requirements of the Act. This section is an almost exact replica of section 54 of the 1882 Act and this accounts for the words " in good faith " being included in the sub-section, because in the 1882 Act the definition of " purchaser " did not include " in good faith ". Whether the repetition of " in good faith " implied by the definition in the 1925 Act has any effect remains doubtful, though it is difficult to see how it can have. There is, however, another point, namely, the protection only affects a dealing with a tenant for life or statutory owner, that is to say, that there is no protection *under this sub-section* where the estate owner is

not a tenant for life or statutory owner. *Prima facie* this would render the curtain valueless. The form of the vesting instrument puts the purchaser on notice that there is a settlement to be investigated to ensure that the person with whom the purchaser is dealing is a tenant for life or statutory owner. It is submitted that, if the sub-section stood alone, a purchaser would certainly be compelled to investigate the settlement. This is not surprising, because the terms of the sub-section were in fact dictated in 1882 by a settlement which in fact had to be investigated and the purchaser had to satisfy himself that the vendor was the person having the powers of a tenant for life. The section affords protection in the exercise of powers *properly* vested in the estate owner, but does not afford protection against an improper claim to exercise powers by an estate owner who has no right to them. Presumably section 110 (2) was intended to fulfil this purpose.

(5) *Protection for first vesting instrument.*

Section 110 (2) deals with the matter by very different language, and in the interpretation of this Act differences of language have been held to be significant: *Re Craven's S.E.*, [1926] Ch. 985. It provides that a purchaser, except as therein expressly provided, shall *not be bound or entitled* to call for the trust instrument or any information concerning the same *and* whether or not he has *notice of its contents* he shall be *bound and entitled* to assume certain facts if the last or only principal vesting instrument contains certain particulars required by the Act unless otherwise therein expressly provided. Of these particulars required by the Act under section 5 it is necessary to mention only one, namely, " the names of the persons who are trustees of the settlement ". It is submitted that if the wrong trustees were named in the vesting instrument it would *not* contain the particulars required by the Act. In *Re Cayley and Evans' Contract*, [1930] 2 Ch. 143, a vesting instrument executed by two trustees of whom only one was a trustee of the compound settlement, was held to be invalid for naming the wrong trustees notwithstanding section 5 (3) which provides for invalidity by reason only of any error. It is possible that " error " here cannot be interpreted to include an omission, for example, of the names of the proper trustees, though it does protect against the *inclusion* of a wrong document declared to form part of a compound settlement: *Re Curwen*, [1931] 2 Ch. 341.

It is true that in *Re Cayley and Evans' Contract* (*supra*) the purchaser was required to have notice of the compound settlement by virtue of the proviso to section 110 (2), but it is submitted that this did not affect the reasoning that the vesting instrument did not contain the particulars required by the Act. The point is that, on the wording of the sub-section, unless those particulars are there a purchaser is neither bound nor entitled to make any of the assumptions specified in the section. On the other hand, how is a purchaser to know whether the persons named in the vesting instrument are the persons who are the trustees of the settlement unless and until he has investigated the settlement?

It is thought that these observations apply equally to the requirement concerning the name of any person for the time being entitled under the instrument to appoint new trustees.

(a) *No proper facts as required by the Act.*

The only answer to this dilemma is that the provisions of section 110 (2) are inconsistent with such an interpretation of the words "if the . . . vesting instrument contains the statements and particulars required by this Act". The things which a purchaser is bound and entitled to assume include "the statements and particulars required by this Act . . . were correct at the date thereof" and that the estate owner is the tenant for life or statutory owner and the trustees are properly constituted trustees. It can reasonably be argued that a purchaser is bound to assume the statements to be correct if the vesting instrument *purports* to contain the particulars required by the Act.

If this had stood alone we think that the Court, though not without difficulty, might have interpolated the appropriate words, but it is not quite so simple as that. By section 4 (1) every settlement of a legal estate in land is required to be effected in a certain form and if effected in any other way it shall not operate to transfer or create a legal estate. The form specified in the section is by a vesting deed and a trust instrument, and the section then specifies what a vesting deed *shall* do and what a trust instrument *shall* do. On any reasonable interpretation of language a purported vesting deed that does not do what is required of it by the section is not a vesting deed for the purposes of the section and, therefore, if by virtue of the trust instrument or otherwise the land is settled land it does not operate to transfer or create a legal estate in accordance with sub-section (1). Sub-section (2) requires that by the vesting deed the land shall be transferred to the tenant for life or statutory owner, *i.e.*, the person or persons who by virtue of sections 19, 20 and 23 (or as the case may be) are entitled to the powers of a tenant for life.

Even without the proviso to section 110 (2) next to be considered it is difficult to see how section 110 (2) really protects a purchaser who does not ascertain that the vesting deed is a vesting deed, and for this purpose he must find out whether it conveys the land to or declares it to be vested in the right person. If this is correct then it is difficult to resist the necessity of seeing also that it complies with section 5 except in so far only as it may contain errors but not omissions: *Re Cayley and Evans' Contract* (*supra*); *Re Curwen* (*supra*). But if a purchaser must go thus far how can he be said to be acting "in good faith" if he disregards other information which comes to him in the course of investigation?

(b) *Effect of some vesting instruments not protected.*

But a purchaser's position is rendered even more difficult by reason of the proviso. So far as the proviso relates to settlements created prior to the Act there is no problem, but it also includes three other cases, all of which it is to be noted are cases in which section 4 for one reason or another has not been complied with. The cases are where a first vesting instrument is executed to give effect to (i) an instrument deemed to be a settlement; (ii) a settlement deemed to have been made by any person; and (iii) an instrument *inter vivos* intended to create a settlement which does not comply with the requirements of the Act.

In all those cases the purchaser is concerned to see that the instrument is correct both as to the persons having the powers of a tenant for life and as to the trustees of the settlement. The first example is difficult to trace; the second covers such matters as infancy, and the third is the case within section 9 which we have already discussed because the vesting instrument should there be executed apparently by the trustees.

Now this proviso is not expressed to apply where a first vesting instrument is *expressed to be* executed for any of these purposes. How then is a purchaser to know whether in fact it is executed in pursuance of any of these objects (and more particularly the last) unless he insists upon inspecting the trust instrument to see that it complies with sections 4 and 5 of the Act? Here the inconsistency is within the sub-section itself and generalities about the purpose of the Act and particular sections overriding provisions not directed exactly to the same point seem beside the mark. Not only must a learned Judge be asked to hold that section 110 (2) applies when the vesting instrument *purports* to contain the particulars required by the Act, but also that the proviso applies only where the vesting instrument is *expressed to be* executed for the purpose of giving effect to the cases therein mentioned, and further that section 4 (1) does not apply in favour of a purchaser who acts on the faith of an instrument purporting to do what is required by section 4 (2) and purporting to contain the particulars required by section 5 (1) and notwithstanding that there is no trust instrument complying with section 4 (1) and (3). It is submitted with respect to contrary views that all this requires a good deal of ingenuity from the learned Judge.

(c) *When is there a purchase of "settled land?"*

But even then we have not finished because section 110 (2) only applies to a purchaser of "a legal estate in settled land". How can it be a *legal estate* in settled land unless section 4 is complied with? And how is a purchaser to know that it is *settled land* unless he inspects the trust instrument to ensure that the land is and *remains* settled? As we have pointed out, the Court has already gone behind the legal estate to discover that it has *ceased* to be settled land: *Re Bridgett and Hayes' Contract*, [1928] Ch. 163. In this case the Court forced a title upon a purchaser from persons not apparently entitled to deal with the estate if it had been settled. Surely, therefore, equally it could not force upon a purchaser a title by the person entitled to deal with it only as settled land. Supposing two persons had simultaneously entered into contracts for sale? But if the Court cannot force the title on the purchaser, is a purchaser entitled or bound to assume that because there is a vesting instrument therefore there is settled land?

To take a simple illustration: A by will gives Blackacre to his daughter for life until she charges or assigns her interest and subject thereto to his son absolutely. The daughter, having a vesting assent in her favour, charges her life interest and then sells part of the land. Is the purchaser protected and, if so, why? It is submitted that unless yet further words are read into section 110 (2) by the Court it cannot protect a purchaser. The land has ceased to be settled land since it is no longer land which is or is deemed to be the

subject of a settlement, unless a very queer construction is put upon section 2 of the Act as to the meaning of settled land, which seems unlikely: *Re Gaul and Houlston's Contract*, [1928] Ch. 689. This point is of great importance because, if it is correct, it goes not only to the creation of the settlement, but also to the continuance. Neither the proviso nor sections 4 and 5 relate to what occurs after the settlement has been duly constituted, but the requirement of settled land presumes some knowledge of the continuance of a state of affairs. What is more, the reference to settled land in section 110 (2) is not conditioned by notice but by the fact that there is a legal estate in settled land.

And again both Act and decisions have investigated this possibility of discontinuance in connection with undivided shares. Section 36 of the Act provides that so soon as settled land becomes vested in undivided shares in possession it shall be held upon the statutory trusts for sale, which clearly prevent it from remaining settled land: section 1 (7) and cf. *Re Gaul and Houlston's Contract* (*supra*); *Re Ryder and Steadman's Contract*, [1927] 2 Ch. at p. 75. Now if it ceases to be settled land, then the protection of section 110 (2) ceases as well by virtue of the words " a purchaser of the legal estate in settled land ". Furthermore, since the land is held upon the statutory trusts for sale no receipt for the purchase money can be valid unless it is paid to less than two trustees for sale: Law of Property Act, 1925, s. 27 (2). The trustees of the settlement will not, of course, be the trustees for sale until the land has been conveyed to or vested in them: cf. Settled Land Act, s. 36 (2); and normally the estate owner will only be a sole trustee for sale. Consequently, either a purchaser is left to take the risk that the land has not vested in persons in undivided shares in possession, or alternatively he is at all times entitled to such notice of the contents of the settlement as will satisfy him that it is not so held. We do not stay to consider the precise effect of a conveyance by a sole estate owner who, by virtue of section 36 (1), is " in the meantime " holding the land " on the same trusts as would have been applicable thereto " had the estate been vested in the trustees of the settlement on trust for sale, because this depends upon the exact effect of section 27 of the Law of Property Act, 1925, which to us is obscure (*d*).

From these considerations we observe that in fact as drawn section 110 (2) does not afford the protection which appears on the surface unless many additional provisions are interpolated by judicial interpretation.

(6) *Protection where no trustees.*

The remaining sub-sections of section 110 are directed to more specific points. Section 110 (4) provides that where no capital money arises a purchaser takes notwithstanding the absence of trustees, which is straightforward and presents, we think, no problem.

(*d*) The title would in any event appear to be unmarketable: *Re Norton and Las Casas' Contract*, [1909] 2 Ch. 59.

(7) *Dispositions by personal representatives.*

Section 110 (3) is not so simple. It is concerned with "a purchaser of a legal estate in settled land" and "entitles" him to make certain assumptions. What we have said concerning section 110 (2) about "settled land" applies equally in this case. To our mind the inclusion of the words "of settled land" in fact deprives the sub-section of all real virtue. This, however, does not put an end to difficulties. Put shortly, the protection intended to be afforded covers (i) payment of money to a personal representative on the assumption that he requires it for the purposes of administration; (ii) payment to trustees by the direction of a personal representative on the assumption that they are the trustees; and (iii) that the personal representative "is acting under his statutory or other powers". "Personal representative" is defined (section 117 (1) (xviii)) as "the executor, original or by representation, or administrator, for the time being of a deceased person, and where there are special personal representatives for the purposes of settled land means those personal representatives". It is submitted that this presents another major problem because it remains obscure when "special personal representatives" may exist. In this respect *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, and the other cases certainly do not make for certainty.

Section 22 of the Administration of Estates Act, 1925, provides that "the trustees of the settlement" are deemed to be appointed special executors of a deceased testate estate owner. That is to say, it is not the persons necessarily named in the vesting instrument, but the persons who are in fact trustees who are special executors. Presumably as with other executors the legal estate vests in them immediately on death: see, *e.g.*, *Whitehead* v. *Taylor*, 10 A. & E. 210, at p. 212, *per* Denman, C.J. It is submitted that whether or not settled land is excepted from the grant to the general personal representatives the legal estate remains in those trustees and section 110 (3) applies only to the acts of those trustees. As the sub-section only applies to settled land, *Re Bridgett and Hayes' Contract* (*supra*) can have no application and a general grant can only come within the protection afforded by the sub-section either when the estate owner died intestate or when there were no trustees of the settlement. To be satisfied as to the latter the settlement must be investigated and, perhaps, to be satisfied that the purported trustees were the trustees a purchaser must investigate the settlement where there is a special grant.

There are two other points. First, under this sub-section a purchaser is only entitled but apparently not bound to make these assumptions. The absence of the "binding" provision throws doubt on when a purchaser should waive his right to make the assumption and require to be satisfied. It is submitted that the change in wording must leave the option with the purchaser and not with the vendor deducing title. Secondly, as we have said, the purchaser must act in good faith, and it would seem that in settled land the powers of personal representatives are much curtailed. The function of the executor is to hold the land on trust to convey to the person who

becomes tenant for life and not to deal with it in the general course of administration : cf. section 7 (1). This is in conformity, of course, with the law prior to 1926 when, ordinarily, on the death of a life tenant the estate did not vest in his personal representatives. Therefore, if the circumstances are such that it may be assumed that the special executors have made provision for death duties (see L. P. A., s. 16 (1)), it is difficult to see how any purchaser can be said to act *bona fide* in taking a conveyance from them. Mere possession of the settled land by the tenant for life would not be sufficient, because possession can be given before the administration is complete : A. E. A., s. 43. If, however, in any previous transaction the new tenant for life has been joined, for example, it is submitted that a purchaser must insist on a vesting assent being executed. So, where a grant of a right over land adjacent to the settled land was granted to the special executors and to the person who was recited to be entitled as tenant for life, it is conceived that no title could subsequently be made by the special executors as personal representatives on the strength of section 110 (3).

(8) *Land formerly subject to a vesting instrument.*

Section 110 (5) relates only to land " formerly subject to a vesting instrument ". In this case a purchaser of a legal estate shall be bound and entitled to act on the assumption that where a conveyance or assent was made without stating who were the trustees, the person in whom the land was vested by the conveyance or assent was entitled to it free from limitations and that every statement of fact in such conveyance or assent is correct. There are variations for conveyance or assent to personal representative or trustee for sale. Presumably the intention of this sub-section is to protect a purchaser from a person taking a voluntary conveyance or assent intended to be free from the settlement and notwithstanding that there is no deed of discharge under section 17. Presumably and in particular it contemplates dispositions made under section 16 of the Act.

There is, however, one first-class flaw in this sub-section. It is assumed that the conveyance is to be made by a person who takes immediately under the vesting instrument. Now this person is normally a tenant for life or statutory owner (indeed, it is difficult to see how he can be anyone else except by mistake), and any disposition which he makes will be void as a disposition unless it is authorised by the Act : section 18 (1) (a). If it is void as a disposition the conveyance cannot operate to vest the property in the person to whom it purports to convey it and so he cannot get it free from limitations under the settlement. Therefore, so far as section 16 is concerned, its effect appears to be almost nugatory.

If, however, the words " formerly subject to a vesting instrument " are intended to confine the operation of this protection to a case where the conveyance or assent is made after the land has ceased to be subject to a vesting instrument section 18 does not apply. It is submitted that there is no judicial decision which lays down the principle on which this state of affairs is to be determined. *Wolstenholme and Cherry* (Vol. II, p. 1175) seem to suggest that the sub-section relates only

to the case of the settlement *ceasing* on the death of the "trustee estate owner". In this event the question depends entirely upon the existence or otherwise of a "general grant" and how far a purchaser must accept the fact that settled land is not excepted as proof that the land ceased to be settled land. In these circumstances the protection afforded by section 110 (5) seems in effect to carry us no real distance at all. It virtually amounts to saying that if general personal representatives make a conveyance or assent without referring to trustees the land *remains* land *not* settled under the Settled Land Act by virtue of any will of the deceased. If the land had been resettled in the lifetime of the deceased "trustee estate owner" the special personal representatives should take out a grant: *In the estate of Taylor*, [1929] P. 260.

(9) *Some practical observations.*

The effect of this examination of the relevant provisions and the cases involving notice since 1925 can only be described as disheartening. With each step obscurity grows. The real reason for this is that the whole system of settled land is now built upon what can only be described as a series of legal fictions and these fictions are imposed by statute and not developed under the comparatively logical direction of case law. Nevertheless, from a conveyancer's point of view we should say that the practical view of the situation is as follows:—

1. Prior to a vesting instrument the effect of land becoming settled land in equity is to sterilise it, so far as concerns dispositions, except and in so far as a disposition is made in favour of the old *bona fide* purchaser for value of the legal estate without notice actual or imputed. The old law of notice remains as it was.

2. Where a first principal vesting deed appears on the title a purchaser will be protected if he acts upon it, unless by any instrument or fact *dehors* the principal vesting deed or by any fact in the deed itself he should have notice that the deed does not comply with sections 4 and 5 of the Act. For example, if an estate contract is registered prior to the deed he should consult the contract which may show an informal settlement and bring the case within the proviso to section 110 (2). Again, if the trust instrument is not of even date with the vesting instrument (unless the trust instrument is a will) he should examine the trust instrument to see whether it is an informal settlement, and so, again, within the proviso. In this connection we may refer to sections 10 and 183 of the Law of Property Act which relate to the necessity of disclosing all documents necessary to a proper investigation of the title. It is thought that section 10 provides no protection for failing to abstract documents such as informal settlements.

This leaves unsolved the problem whether the fact that the land happens not to be settled land will affect a purchaser. It is thought that probably the Courts would hold that it would not, but we offer no prophecy of the reasoning by which this result may be reached except that probably it will be a variation on the doctrine of notice. But in our view any logical interpretation of the words of the relevant sections requires a purchaser to ascertain both that the land was settled in accordance with the Act and that the relevant documents contained the requisite particulars. If, as we suspect, the Courts feel

bound to strain the meaning of the words the results may be very curious and give rise to problems which at the moment we do not foresee. In either case it emphasises the need for the most careful preparation of vesting instruments to ensure that they give rise to no doubt in a purchaser's mind.

3. If we have forecast accurately the manner of judicial interpretation under the last head we think that any properly drawn second or subsequent vesting instrument will protect a purchaser, and so also of any properly drawn declaration of appointment of new trustees. But a purchaser must be instant to watch for any variation from the normal and then insistent upon satisfaction that all is in order. Recitals in any of these instruments save of the most formal kind would be one danger point.

4. Dispositions after the death of an estate owner and before the execution of a fresh vesting instrument, though frequently met, present probably the most intricate problem of all. In our view special personal representatives should avoid as far as possible any disposition other than a vesting assent or, if the settlement comes to an end before any disposition has become necessary, an ordinary assent claiming the protection of section 110 (5).

Even if a special grant exists it may give rise to two quite separate difficulties. First, if any part of the land comprised in a vesting instrument has ceased to be settled, as, for example, by the estate owner having discharged all the limitations under the settlement affecting it, apparently it will not vest in the special personal representatives: *Re Bridgett and Hayes' Contract*, [1928] Ch. 163. In such circumstances any disposition would be completely invalid. By reason of the incorporation of the words "settled land" in section 110 (3) no protection is afforded there or elsewhere in the Act. We cannot see why a purchaser is not entitled to be satisfied that the settlement subsists so far as that land is concerned.

Secondly, if the general grant contains an exception of settled land there may be land which has been settled informally by the deceased. It is submitted that unless the exception specifies the settlement which is excepted, such land does not vest in the general personal representatives. Consequently, they have no title to deal with it and cannot claim the benefit of section 13 of the Act, because the purchaser is not a purchaser of the legal estate without notice prior to the execution of a vesting instrument, since he cannot get a legal estate because it is not vested in the general personal representatives. A simple example would be a charge of an annuity upon part of the deceased's land in favour of his wife who survives him. This second difficulty would be eliminated, it is thought, if the general grants limited exceptions to any land comprised in designated settlements.

But the problems of representation do not usually arise in connection with special grants, but with general grants which do not except settled land by virtue of which general personal representatives claim to dispose of land "formerly subject to a vesting instrument" if, indeed, that expression properly applies. In our view the mere non-existence of an exception of settled land does not protect purchasers dealing with general personal representatives. Notwithstanding *Re Bridgett and Hayes' Contract* (*supra*) and section 204 of

the Law of Property Act, we do not see how the mere failure to except settled land from the grant excludes the operation of section 22 of the Administration of Estates Act. If, in fact, the settlement has not come to an end the general personal representatives have no power to deal with the estate, save, perhaps, where there are no trustees of the settlement: see *Re Thomas*, [1939] Ch. 513. The last-mentioned case provides a separate problem in itself which is outside the scope of this article.

5. None of these suggestions solves the problem presented by section 36 which establishes a trust for sale so soon as the beneficial interests vest in possession in undivided shares. If the provisions of the section are observed no difficulty arises, but it is submitted that there is no protection given by the Act where an estate owner purports to dispose of the land under the Settled Land Act. No doubt the cases in which this could happen are small in number, but to describe the position as an inelegance is hardly adequate.

6. Until the meaning of the words "dealing in good faith" has been judicially determined, we do not think that a purchaser should be asked to disregard facts within his knowledge which are inconsistent with the proposed disposition. A simple illustration arose in the writer's experience in which on a pre-1926 settlement the tenant for life was an infant and the first vesting instrument was made in favour of the statutory owners. Prior to the execution of conveyance the infant attained his majority and the purchaser, rightly in our opinion, declined to complete until a vesting deed had been executed in favour of the tenant for life. This refusal could not be based on the proviso to section 110 (2), which is concerned with the first principal vesting deed only, but it is submitted that dealing in good faith must have some meaning other than not dealing fraudulently.

Concluding observations.

At the risk of lengthening an already overlong article we cannot forbear a few observations that may put these matters into their proper perspective. In our opinion two major errors were made in the framing of the Settled Land Act. First, the draftsmen were not ruthless enough in destroying interests which did not conform to the principles of the Act. Secondly, both directly and indirectly, too much of the old language and machinery of the Settled Land Acts, 1882–90 survived. That little advantage in certainty arising from judicial interpretation was gained can be seen from the sad history attaching to the decisions on the meaning of "trust for sale" where the old cases were incorporated but disregarded in subsequent interpretation.

The essential difficulty is derived from the fact that formerly there were limited estates with additional powers. Now there is a theoretically unlimited estate, namely, a fee simple, to which it is inappropriate at law to attach powers either of enjoyment or disposition, but which in effect has been shorn of all its legal "rights" of disposition and to which apparently there is an attempt to attach "powers". This is a confusion between the position of trustees who have unlimited rights of disposition which *may* be affected by equitable limitations against a purchaser with notice and the old limited estates

which at law did not enable its owner to dispose at all of any less limited estate. Actually these notions are quite inconsistent. Nevertheless, the confusion is apparent in the decisions on the Settled Land Act which treat the estate owner as a limited owner for the purposes of enjoyment and as an unlimited owner for the purposes of disposition. This is the more curious because we should have thought that upon any strict construction of the Act the position would have been reversed in so far as a logical scheme can be discerned.

The powers of disposition are not conferred upon the estate owner as such but upon certain limited owners who can exercise them if and when they also acquire the legal estate. On the other hand, practically no powers of enjoyment are provided by the Act and, therefore, we would have thought that the rights of enjoyment annexed to a fee simple must apply in and so far as they are not cut down by the trusteeship imposed by section 16. It is submitted that the real scheme of the Act could have been carried out with much greater simplicity by requiring vesting instruments in a certain form, conferring upon estate owners mentioned in them certain capacity to dispose, and then providing how (for internal purposes but not so as to affect a purchaser) the right to estate ownership should be determined. Finally, it would have been simple to provide devolution on death only through trustees until a deed of discharge. With a very simple provision a purchaser acting upon this scheme could have been protected and no question of " tenant for life or statutory owner ", etc., could be in question at all. Not only would it be simpler but it would conform to the old Common Law as modified by trusts and the doctrine of notice, which latter has been modified by equity in the case of trusts for sale as now incorporated in the Law of Property Act, 1925, s. 2, and as, indeed, is in fact contemplated in the case of settled land by that section.

" Settled land " in the circumstances so described would then include all land subject to a vesting instrument, whether or not the estate owner was still alive, until the settlement was discharged by a deed of discharge executed by the trustees. In other words, it would not mean cases falling within section 1 and remaining " settled " so long as those circumstances lasted. Section 1 would define the circumstances in which a vesting instrument must be executed or the rights of parties other than the estate owner would be overreached and destroyed. Such a sanction would no doubt prevent some slipshod conveyancing. On the other hand it is difficult to see why the character of the trust instrument need be determined by the Act, and of course a purchaser could not be concerned with it.

Notwithstanding some peculiar language and provisions it is believed that we have outlined the scheme that was intended to be carried out, and it is submitted that with some straining of language the Courts could still largely give effect to it, but, if so, they must turn their backs against the sort of construction that led to *Re Bridgett and Hayes' Contract* (*supra*) and *Re Duce and Boots' Contract*, [1937] Ch. 642, which throws doubt upon the effectiveness of the whole scheme though it may prevent some hardship in individual cases. Probably one or two resolute decisions of the Court of Appeal could put the trend of the cases along another path.

It is thought that nothing can quite avoid some errors of drafting

and this includes the provisions of section 36 which seem too precise for any form of judicial evasion. Here a short amending Act is urgently called for. Not everyone has shared the draftsmen's liking for statutory trusts for sale which carry the legal fiction one stage further: see, *e.g.*, *Re Kempthorne*, [1930] 1 Ch. 268; *Re Mayo*, [1943] Ch. 302; for a settlement of land is neither intended to be a settlement of personalty nor is it intended to involve an imperative direction to sell.

HAROLD POTTER.

WATER ACT, 1945.

By S. R. HOBDAY, O.B.E., of Gray's Inn, Barrister-at-Law.

This important enactment, which puts into a concise form much of the law relating to water, received the Royal Assent on June 15, 1945, but did not come into operation until October 1, 1945. It does not extend to Scotland or Northern Ireland.

In this article it has been thought desirable to give, in the first place, a general outline of the provisions of the Act and to follow this by a more detailed examination.

OUTLINE OF THE PROVISIONS OF THE ACT.

The intention of the Act is to enable effect to be given to the water policy set out in Part I of the White Paper (A National Water Policy—Cmd. 6515) of April, 1944.

PART I.

This part of the Act places for the first time on the Minister of Health the specific duty of promoting the provision of adequate water supplies, the conservation of water resources and the effective execution by water undertakers, under his control and direction, of a national water policy. For these purposes the powers of the Minister are considerably extended by the Act. Provision is made for a Central Advisory Water Committee to advise the Government on general questions relating to water, and for local Joint Advisory Water Committees to be constituted by order of the Minister where he is satisfied that they are necessary for any areas. They will have the duty of planning to meet future needs of their areas. The Minister is given power to obtain information as to surface and underground water resources and user, and the Department of Scientific and Industrial Research is empowered to obtain information from persons sinking wells or boreholes.

PART II.

This part of the Act deals with local organisation of water supplies and includes machinery for securing, if necessary by compul-

sion, the combination of undertakers and the transfer of undertakings, the variation of limits of supply and the supply of water in bulk. The default powers of the Minister in relation to the various types of statutory water undertakers, including companies, are set out in section 13.

Part III.

This part of the Act (which is of great importance to landowners) provides for the conservation and protection of water resources and prevention of waste. Section 14 enables the Minister, if satisfied that special measures for the conservation of water in any area are necessary in the public interest, to make an order (*a*) defining the area in question. A licence from the Minister is then required for new wells or enlargements of existing wells in that area. The Minister may impose requirements for conserving water in the case of a new boring for minerals in such an area, but without interfering with the winning of minerals. It is made an offence to allow underground water to run to waste in any such area, or to abstract it in excess of reasonable requirements, from any well or other work; a Court of summary jurisdiction may order that an overflowing well or other work shall be sealed. Water undertakers are empowered by this part of the Act to make agreements with owners, occupiers and local authorities for carrying out drainage and other works intended to safeguard the purity of supplies; to limit the use of hosepipes in periods of drought; and to execute works for the protection of sources. They are given general powers to make by-laws, subject to the Minister's approval, for preventing waste, misuse, contamination and pollution of water; the Minister may require the making of such by-laws, may make by-laws himself in case of default, and may revoke unsatisfactory by-laws. The pollution of any spring, well, etc., from which water is used for human consumption is made subject to penalties.

Part IV.

This part of the Act enables, or provides machinery for enabling, statutory water undertakers to construct works, to purchase land, to obtain and to supply water and to deal with various other matters essential or incidental to the carrying on of their undertakings. Provision is made for compulsory acquisition of land and of water rights. Water undertakers are required in certain circumstances to supply water for industrial, agricultural and other non-domestic uses. The powers and duties of local authorities are enlarged as regards extensions of mains and securing the provision of piped water in houses. Provision is also made for the revision of water rates and charges, and for the incorporation in orders made under the Act, and ultimate application to existing Acts and orders, of the standard clauses in the Third Schedule to the Act. These clauses in effect replace the Waterworks Clauses Act of 1847.

(*a*) No such orders have yet been issued.

PART V.

This part of the Act deals with various matters of machinery, including inquiries, regulations, prosecutions, penalties, expenses, notices, entry of premises, definitions, savings and repeals.

SCHEDULES.

The First and Second Schedules set out detailed procedure governing applications for and the making and confirmation of orders, approval of agreements, and the making and confirmation of by-laws. The Third Schedule contains a series of standard clauses for incorporation with or without modification as appropriate in orders under the Act. The clauses deal with the relations of water undertakers with consumers and with highway and other authorities and interests, and with various other matters. This Schedule is based on the Waterworks Clauses Act, 1847, and on various amending and supplementary enactments including those commonly allowed by Parliament in modern local Acts. It provides a new "code" governing the day-to-day running of water undertakings, in substitution for the "waterworks code" provided by the Act of 1847. Section 32 (2) of the Act provides for the application of the "code" to existing Acts and orders. The Fourth Schedule makes various consequential amendments in the Public Health Act, 1936, and the Fifth Schedule contains a list of enactments repealed.

The following is a more detailed examination of the provisions of the Act, but at this point it should be mentioned that the Statutory Orders (Special Procedure) Act, 1945, which comes into operation on June 1, 1946, applies to any order made or confirmed under the Water Act, 1945, and it is possible that there may be further amendments in procedure if the Acquisition of Land (Authorisation Procedure) Bill, which is now before Parliament, becomes law.

PART I.

Central and Local Planning.

Section 1 provides that it shall be the duty of the Minister of Health (thereinafter in the Act referred to as "the Minister") to promote the conservation and proper use of water resources and the provision of water supplies in England and Wales and to secure the effective execution by water undertakers, under his control and direction, of a national policy relating to water, and it is provided by section 2 that the Minister shall appoint a committee, to be called the Central Advisory Water Committee, for the purpose of

(a) advising him or any other Minister concerned upon matters connected with the conservation and use of water resources;

(b) advising any Minister concerned with the administration of enactments which relate to or in any way affect the conservation or use of water resources or the provision of water supplies, upon any question that may be referred by him to the Committee in connection with the operation, or proposed amendment of, such enactments;

(c) considering the operation of any such enactments, and making to the Minister concerned such representations with respect to matters of general concern arising in connection with the operation of those enactments, and such recommendations for their extension or modification, as the Committee think fit.

The Minister is empowered to make provision by order with respect to the constitution and procedure of the Committee and under this power he has made the Central Advisory Water Committee Order, 1946, dated January 9, 1946 (S. R. & O., 1946, No. 28).

It is provided by section 3 that if, with respect to any area in England and Wales, the Minister is satisfied that the provision of water supplies for that area or the conservation of water resources for the purpose of such provision may be thereby more effectively secured, he may by order constitute for that area a Committee, to be known as a Joint Advisory Water Committee. Any such order may apply to such a Committee, subject to any necessary modifications, any of the provisions of the Local Government Act, 1933, other than the provisions of that Act enabling land to be acquired compulsorily.

By section 4, an order made under section 3 may prescribe the duties of Joint Advisory Water Committees and these may include the duties of carrying out a survey of the existing consumption of and demand for water supplies in their area and of the water resources in or available for their area; preparing an estimate of the future water supply requirements of their area and proposals for meeting such requirements; and furnishing the Minister and statutory water undertakers and local authorities with such information relating to water supplies in their area or water resources in or available for their area as they may reasonably be required to furnish.

Any person authorised by a Joint Advisory Water Committee for the purpose shall, on producing, if so required, some duly authenticated document showing his authority, have a right at all reasonable hours to enter any premises for the purpose of carrying out the functions of the Committee. The exercise of this right of entry is regulated by section 48 of the Act, which contains provisions for the protection of the occupier of premises.

Provisions of considerable importance to owners and occupiers of land are contained in sections 6 and 7. Under section 6 the Minister may make regulations requiring any class of persons to keep such records and furnish such returns as to the quantity and quality of water abstracted by them from any source and as to such other matters relating to the source as may be prescribed by the regulations: Provided that—

(a) the regulations shall not apply in a case where water is abstracted by an individual for the domestic purposes of his household only;

(b) in a case where the Minister is satisfied that in all the circumstances compliance with any requirement of the regulations is impracticable or undue expense would be thereby incurred, he may direct that that requirement need not be complied with.

The regulations may provide for the inspection of any records kept thereunder and of any apparatus used for the purpose thereof and for the taking of copies of and extracts from any such records and may confer rights of entry for the purpose of exercising any of the powers, and section 48 of the Act is to apply to any such right of entry. Failure to comply with any requirement of the regulations is an offence against the Act.

Attention is particularly directed to section 7 which deals with facilities for obtaining information as to underground water. The section provides that—(1) any person who proposes to sink, for the purpose of searching for or abstracting water, a well or borehole intended to reach a depth of more than 50ft. below the surface, shall, before he begins to do so, give to the Committee of the Privy Council for Scientific and Industrial Research notice in writing of his intention to do so, and shall keep a journal of the progress of the work, which shall include measurements of the strata passed through and of the levels at which water is struck and subsequently rests, and shall allow any person authorised by that Committee for the purpose, on producing his authority, at all reasonable times—

(a) to have free access to the well or borehole;

(b) to inspect the well or borehole and the material excavated therefrom;

(c) to take specimens of such material and of water abstracted; and

(d) to inspect and take copies or extracts from the journal.

Section 48 (except sub-section (6) thereof) regulating right of entry is not to apply to any right of entry under section 7. (2) On completion or abandonment of the work, the person sinking any such well or borehole shall send to the Committee a complete copy of the journal and particulars of any test made of the rate of flow of water, etc.

The person sinking a well or borehole or (if a different person) the owner or occupier of the land may give notice to the Committee requiring them to treat as confidential the journal or any copy of or extract therefrom and the Committee must comply with this, except in so far as it contains information as to water resources and supplies, and shall not allow publication unless the person giving the notice consents. If consent is withheld there is an appeal to the Railway and Canal Commission. Failure to comply with the provisions of section 7 is an offence against the Act.

The purpose of the provisions of section 7 is to ensure, in the national interest, that all the scientific information which can be obtained from borings, sinkings and other works shall be collected in as accurate and complete a form as possible, and shall then be available for the general information of all concerned with water supply.

The Committee of the Privy Council for Scientific and Industrial Research in September, 1945, issued full notes for the guidance of contractors and others and these should be consulted. Before any operations are begun the Committee should be notified, as mentioned above, the notification being sent to the Director, Geological Survey and Museum, Exhibition Road, South Kensington, London, S.W.7.

Part II.

Local Organisation of Water Supplies.

This part of the Act, sections 8 to 13, deals with the local organisation of water supplies. It should be noted that section 12 provides that any statutory water undertakers may, with the approval of the Minister, enter into an agreement with any other persons, for the giving by those other persons of a supply of water in bulk for any period and on any terms and conditions. The provisions of Part III of the First Schedule to the Act apply to the approval of such agreements.

Part III.

Conservation and Protection of Water Resources.

This part of the Act is of great importance.

By section 14, where the Minister is satisfied that special measures for the conservation of water in any area are necessary in the public interest, whether for the protection of public water supplies or for the protection of water supplies used for industrial or other purposes, he may make an order defining the area in question, and thereupon the provisions of this section shall apply to that area (sub-section (1)).

The provisions of Part II of the First Schedule to the Act, except paragraphs 17 and 18, are to apply to orders made under this section, and such orders are to be provisional only (sub-section (2)).

Subject to the following provisions of the section, no person shall, in any area to which the section applies, begin to :—

(a) construct any well, borehole or other work for the purpose of abstracting underground water; or

(b) extend any existing well, borehole or other work for the purpose of abstracting additional quantities of underground water;

unless he has obtained, in accordance with regulations made under this section, a licence from the Minister (sub-section (3)).

Sub-section (3) shall not apply to :—

(a) the construction or extension of any well, borehole or other work by any individual for the purpose of abstracting water solely and to the extent necessary for a supply of water for the domestic purposes of his household;

(b) the construction or extension of any well, borehole or other work, if that construction or extension is expressly authorised by any enactment;

(c) any experimental boring required in connection with any such construction or extension as is referred to in the foregoing paragraphs of this sub-section. By sub-section (5) no person shall in any area to which this section applies abstract underground water from any well, borehole or other work constructed or extended in contravention of sub-section (3) unless he has obtained, in accordance with regulations made under this section, a licence from the Minister, which may be granted with or without conditions or refused. Before the Minister refuses to grant a licence or attaches any condition thereto he shall grant the applicant an opportunity to be heard by a person appointed for the purpose by the Minister. Under sub-section (7) before any

person begins to construct in any area to which this section applies any new boring for the purpose of searching for or extracting minerals, he shall give notice in the prescribed form to the Minister, and shall take such measures as may be required by the Minister for conserving water, being measures which in the opinion of the Minister will not interfere with the winning of minerals. Before imposing any requirement under this sub-section the Minister shall, if requested to do so by any person interested in the work, grant him an opportunity of being heard by a person appointed for the purpose by the Minister.

Under sub-section (8) any person who contravenes any of the foregoing provisions of this section or any requirement imposed thereunder or any condition attached to a licence granted for the purposes of sub-section (3) or (5) shall be guilty of an offence against the Act.

By sub-sections (9) and (10) no person shall in any area to which section 14 applies :—

(a) cause or allow any underground water to run to waste from any well, borehole or other work except for testing the extent or quality of the supply or cleaning the well; or

(b) abstract from any well, borehole, or other work water in excess of his reasonable requirements.

Contravention of these provisions renders a person liable on summary conviction, in respect of each offence, to a fine not exceeding £10 and the Court may order the sealing of the well or make such other order as they may consider necessary to prevent waste of water. On failure to comply with such an order the Court may (without prejudice to the imposition of any penalty for contempt of Court) authorise the necessary steps to be taken to execute the order, the expenses incurred to be recoverable as a civil debt from the person convicted.

Sub-section (11) empowers the Minister to make regulations with respect to the procedure for making applications to him for the grant of a licence under this section.

Sub-section (12) provides that any officer of a local authority in the area and any officer of any statutory water undertakers likely to be affected by any failure to enforce the provisions of section 14 in any such area shall on producing, if so required, some duly authenticated document showing his authority, have a right at all reasonable hours :

(a) to enter any premises in that area for the purpose of ascertaining whether there is, or has been, on or in connection with the premises any contravention of the provisions of this section; or

(b) to enter any premises in which the authority or undertakers have been authorised to execute an order of the Court made under sub-section (10) of this section, for the purpose of executing that order; and section 48 of the Act relating to entry of premises shall apply to any such right of entry.

Section 15, which relates to agreements as to drainage, etc., of land, should be specially noted. The section enables statutory water undertakers to enter into agreements with the owners and occupiers of any land, or with a local authority, with respect to the execution and maintenance by any party to the agreement of such works as the undertakers consider necessary for the purpose of draining that land, or for more effectually collecting, conveying, or preserving the purity of water

which the undertakers are for the time being authorised to take. An agreement under this section with an owner of land may be registered under section 10 of the Land Charges Act, 1925, as an obligation affecting land falling within Class D, and shall, unless it is void by reason of a failure so to register it, be binding upon and enforceable against his successors in title to that land: Provided that this shall only apply to such an agreement if it is expressed to be binding and enforceable as aforesaid. An agreement under this section with a local authority may extend to the execution and maintenance by that authority of works of sewerage and sewage disposal.

Sections 17 to 20 deal with the making of by-laws. By section 17 statutory water undertakers are enabled to make by-laws for preventing waste and the undue consumption, misuse, or contamination of water supplied by them, and section 18 empowers them, if it appears necessary to them for the purpose of protecting against pollution any water, whether on the surface or underground, which belongs to them or which they are for the time being authorised to take, to make by-laws:

(a) defining the area within which they deem it necessary to exercise control; and

(b) prohibiting or regulating the doing within that area of any act specified in the by-laws.

Where an area has been defined by by-laws under this section, the undertakers may by notice require either the owner or occupier of any premises within that area to execute and keep in good repair such works as they consider necessary for preventing pollution of their water. Failure to comply renders the owner or occupier liable to penalties and there is an appeal to the Minister of Health. Compensation for curtailment or injurious affection under the by-laws of the legal rights of the owner or occupier is payable by the undertakers, under certain circumstances, together with expenses incurred in complying with a requirement. See sub-section (3) for definition of legal rights.

The Minister is the confirming authority as respects by-laws made under either section 17 or 18, and the provisions of Part IV of the First Schedule to the Act apply to the making and confirming of such by-laws. By section 19 (5) provision is made for entry on premises by any officer of the undertakers in order to ascertain if there is or has been any contravention of the by-laws, etc., and section 48 of the Act is not to apply.

By section 20, the Minister is empowered to require statutory water undertakers to make or to revoke certain by-laws under sections 17 and 18.

Penalties for polluting water used or likely to be used for human consumption are imposed under section 21 and there is a right of entry of premises and section 48 of the Act is to apply.

By section 22, statutory water undertakers are empowered to acquire land and to execute works for protection of water.

Part IV.

Powers and Duties of Local Authorities and Water Undertakers.

Under section 24, statutory water undertakers are granted power to acquire land by agreement or compulsorily for any of the purposes

of their undertaking. Acquisition by agreement requires the approval of the Minister. Compulsory acquisition must be authorised by a compulsory purchase order made by the undertakers and confirmed by the Minister. The provisions of the Second Schedule to the Act are to apply to such an order. Regulations (S. R. & O., 1945, No. 1244) have been made by the Minister under the powers conferred upon him by section 51 of the Act.

Statutory water undertakers are by section 25 empowered to hold and also, with the consent of the Minister, to dispose of land. By section 26 they are empowered to take water from any stream or other source, either by agreement with the approval of the Minister, or compulsorily by order.

Adequate compensation water must be provided in certain cases. The provisions of Part III of the First Schedule are to apply to such agreements, and the provisions of Part I of the First Schedule are to apply to applications and orders for compulsory purchase, and any such order shall, in the circumstances specified in paragraph 8 of the Schedule, be provisional only and not have effect until it is confirmed by Parliament.

Subject to the provisions of the Act, statutory water undertakers supplying water otherwise than in bulk are by section 27 to give a supply of water on reasonable terms and conditions for purposes other than domestic purposes to the owner or occupier of any premises within their limits of supply who requests them to give such a supply to those premises : Provided that they shall not be required to give such a supply if their ability to meet existing obligations to supply water for any purposes or probable future requirements to supply water for domestic purposes, without having to incur unreasonable expenditure in constructing new waterworks for the purpose, would be endangered thereby.

By section 28, the duty imposed on local authorities by section 3 of the Rural Water Supplies and Sewerage Act, 1944, to supply water in pipes to rural localities in which there are houses or schools shall extend to all localities to which section 111 of the Public Health Act, 1936, applies, in which there are houses or schools and in which such supply is not already available.

Amendments of the Public Health Act, 1936, are made by sections 29, 30 and 31.

One of the most important provisions in the Act is contained in section 32 which relates to the modernisation of the Waterworks Code. This Code, as amended, is contained in the Third Schedule to the Act, and by sub-section (1) of section 32 the Minister may by any order made under section 9, 10, 12, 23 or 40 of the Water Act apply to any water undertaking to which the order relates such of the provisions contained in the Third Schedule as appear to him to be appropriate, subject to such modifications and adaptations as may be specified in the order. By sub-section (2) the Minister may at any time by order apply the provisions of the Third Schedule to the Act or any of them to the undertaking of any statutory water undertakers supplying water under a local enactment, subject to such modifications and adaptations as may be specified in the order, and he may by the order repeal or amend provisions previously applicable. During the period of five

years from the date of the commencement of the Act, the Minister shall not make such an order except on the application of the undertakers concerned.

The provisions of Part I of the First Schedule are to apply to orders made under sub-section (2) on the application of the undertakers concerned, and the provisions of Part II of that Schedule are to apply to orders made thereunder without any such application. All orders made under sub-section (2) shall, in the circumstances specified in paragraph 8 or 17 of the Schedule, be provisional only.

By section 33 the Minister is empowered, on the application of any statutory water undertakers, by order to repeal or amend any local enactment relating to the supply of water by those undertakers, but provisions as to compensation water shall not be varied. The provisions of Part I of the First Schedule are to apply to orders made under this section and such orders are, in the circumstances specified in paragraph 8 of the Schedule, to be provisional only.

Subject to the provisions of section 34, statutory water undertakers who are carrying out, or about to carry out, the construction, alteration, repair, cleaning, etc., of any reservoir, well or borehole, line of pipes or other work forming part of their undertaking may cause the water therein to be discharged into any available watercourse. There are various safeguards for the protection of certain authorities, and sub-section (3) provides that if the undertakers are requested by the owner or occupier of any land which abuts on a watercourse at a point within three miles of any work of the undertakers from which water may be discharged into that watercourse under the provisions of section 34, to register him for the purpose of this section, the undertakers shall do so and give him notice of their intention to discharge water. The undertakers must take all necessary steps to see that the water shall be as free as may be reasonably practicable from mud and silt and from solid, polluting, offensive or injurious matters, etc. Failure to do so is an offence against the Act. The undertakers are to do as little damage as may be and are to pay compensation for damage.

Part V.

General.

Section 45 prescribes the penalties for giving false information by any person who has to keep any record or journal or furnish returns, etc., or for knowingly making any statement which is false in a material particular for the purpose of obtaining any licence from the Minister under the Act. Penalties for offences against the Act are prescribed by section 47.

Section 48 deals with the cases where right of entry is conferred by the foregoing provisions of the Act. (See these various cases, *supra*.)

The Minister is empowered by section 51 to make regulations prescribing anything required to be prescribed for the purpose of any provision of the Act. All regulations must be laid before Parliament. The only regulations which have so far been issued are those referred to above, which relate to the compulsory acquisition of land.

NOTES OF RECENT CASES.

1. *PROPERTY AND CONVEYANCING CASES.*

Vendor and Purchaser—measure of damages in purchaser's action.—*Ridley* v. *de Geerts,* [1945] 2 A. E. R. 654, should discourage vendors from backing out of contracts when offered a higher price. In this case the Court of Appeal held that the damages recoverable were the difference between the contract price and the actual price for which the property was sold to a third party. It was argued that from this should be deducted the value of the stamp on conveyance and the purchaser's costs of investigating title and completion. This argument was rejected because the contract was broken within a day or two of being entered into and the learned Master of the Rolls pointed out that there was an active market and the purchaser could have sub-sold without having to investigate title.

Solicitor's lien—solicitor acting for mortgagee and mortgagor.—The decision of Vaisey, J. in *Barratt* v. *Gough-Thomas,* [1945] 2 A. E. R. 414, has been reversed by the Court of Appeal on different grounds. Vaisey, J. was of opinion that in a redemption action the solicitor could not pursue his lien because he was acting for both mortgagee and mortgagor and, therefore, his possession of the deeds did not arise. The Court of Appeal rejected the claim to a lien on the ground that the point raised a *jus tertii,* which was outside the question raised in redemption proceedings. The proper procedure was a separate ordinary summons.

Trusts—remuneration of trustees—trustees as directors.—Trustees must account for all profits accruing to them in respect of their position as trustees. This is not limited to profits directly arising from the trust property provided that it accrues by reason of trusteeship. This rule has received another illustration in *Re Macadam,* [1945] 2 A. E. R. 664. Here, the business of a testator was after his death converted into a limited company on terms which enabled his trustees to appoint themselves directors. The directors did not fix their own remuneration and in the events which happened, the trustees had no power to determine what fees they should receive as directors. Cohen, J. held (distinguishing *Re Dover Coalfield,* [1907] 2 Ch. 76, *Re Lewis* (1910), 103 L. T. 495), that the trustees were liable to account to the trust estate for such fees as they did receive. The essential point is that they were able to nominate themselves and did in fact nominate themselves. In the two cases distinguished, the trustees obtained remuneration by a bargain altogether independent of any property held upon trust. In the instant case the directorship followed from their power as trustees to appoint themselves. They could have nominated someone else and hence their interest for themselves and their duty to exercise a wise discretion for the trust estate were in conflict though it was not suggested that they were not the most suitable directors.

Bailment—liability for loss—landlord of flat—innkeeper.—Two cases on liability arising out of bailment are of interest to property lawyers.

First, in *Andrews* v. *Home Flats, Ltd.*, [1945] 2 A. E. R. 698, the Court of Appeal held that a landlord of flats, who takes into semi-permanent custody the luggage of a tenant's wife, is a bailee for reward. It was even suggested that this includes any other member of the family or a guest. No authority other than common sense was cited for this proposition which is in refreshing contrast to the rule that the wife of a tenant is a licensee and not an invitee in connection with the law relating to dangerous premises: *Cavalier* v. *Pope*, [1906] A. C. 428. It was held on the facts of the instant case that the landlord was liable for a trunk so deposited because of negligence in not providing a proper system to ensure that luggage so deposited was returned to the right person. Secondly, in *Brewster* v. *Drennan*, [1945] 2 A. E. R. 705, an innkeeper was held liable for loss of a fur cape from a bedroom where the guest had left it without locking the door, there being in fact no lock. The facts of this case were peculiar, because several doors could not be locked in this small hotel, and the guest had mentioned the matter to the landlord, who had, in effect, said, "don't worry, nobody will steal here." It was, therefore, as a matter of fact, not negligence in the guest to leave her property thus unguarded: cf. *Shacklock* v. *Ethorpe, Ltd.*, [1939] 3 A. E. R. 372, where the House of Lords laid down the principle of negligence necessary to free the innkeeper from liability, which was applied here.

Charity—Non-public purpose otherwise charitable—distribution where purpose fails.—Re Air-Raid Distress Fund's Trusts, [1945] 2 A. E. R. 712, does not really lay down any new law, but it is most valuable as a warning concerning a problem likely to be met with fairly frequently at the present time. In a large works a collection was made every week among the employees for certain purposes which included a fund for relieving the immediate needs of those in the firm involved in air-raid damage. A fund for relieving distress caused by air-raids was in the opinion of the learned judge (Cohen, J.) a charitable purpose, but, because it was limited to the members of a private firm, it had no public character sufficient to make it a "legal charity". He held himself bound by *Re Drummond*, [1914] 2 Ch. 90 and *Re Compton*, [1945] Ch. 123 (noted *ante*, Vol. 9, p. 152), to hold that employment by a particular company is a purely personal relationship, and not, therefore, in the same category as a trust for persons belonging to a particular locality.

Having come to the conclusion that the trust was not charitable, the learned Judge directed that the subscriptions, so far as they had not been used for the purposes of the trust, should be returned to the subscribers. As some of the money was expended on assisting some of the subscribers, the question arose whether those sums should be deducted from any subscription paid by the person aided. It was held that this should be done. *Re Printers, etc., Society*, [1899] 2 Ch. 184 and *Re Lead Co.'s, etc., Society*, [1904] 2 Ch. 196, were distinguished on the ground that in those cases there were questions of difficulty and expense not involved in the instant case. The evidence in the case noted was that though considerable labour would be involved there would be no actual difficulty in ascertaining the amounts involved.

Yet another point was whether the persons entitled to share included subscribers who had ceased to subscribe before the fund was completed and subscriptions ceased. It was held that these persons were included. The learned Judge pointed out that the rule in *Clayton's Case* did not apply: *Re British Red Cross Balkan Fund*, [1914] 2 Ch. 419: so that total subscriptions of each party represented the ratio of the shares.

The interest of this case lies in the fact that so many quasi-public subscriptions have been collected during the war and indeed are continuing to be collected. In most cases the trusts on which they are held are very vaguely defined, if at all, and owing to the fact that a fund must be for a *public* as well as a charitable purpose, the problem of surplus may arise more frequently in the future than the past. We would urge upon practitioners the desirability in all these subscription cases of starting with a properly drawn trust deed.

Requisitioned premises—change of purpose—Requisitioned Land and War Works Act, 1945. — *Gordon Dadds & Co.* v. *Morris and Others,* [1945] 2 A. E. R. 616, is likely to prove prophetic and will not encourage much wishful thinking on the part of those whose premises have been requisitioned. Here the premises were in 1940 requisitioned under delegated authority by a town clerk for housing refugees. After the end of hostilities with Germany they were then used for accommodating evacuees, possession being retained by the town clerk. The owners having heard of the change of use purported to retake possession and on the same day, on the authority of the Minister a third party took possession for yet a third purpose purporting to be by way of requisition.

Lynskey, J. held that the requisition was valid and the owners could not recover possession. Under the Defence Regulations a requisition could be made for one valid purpose and the premises subsequently used for another valid purpose. As they were in possession of a delegate of the Minister he could further direct an entry into possession of a third party under the Requisitioned Land, etc. Act, 1945, on the ground that he had retained possession, because the possession was vested in his delegate.

Separation deed—covenant to pay wife—death of husband.—Langstone v. *Hayes,* [1946] 1 A. E. R. 114, is a decision useful both on separation deeds and on the construction of deeds generally, especially with reference to the Law of Property Act, 1925, s. 80 (1). The separation deed merely covenanted to pay the maintenance to the wife unless the parties resumed cohabitation or she became unchaste. There was also an agreement that the parties might live apart. The Court of Appeal held that on the death of the husband the annuity ceased to be payable and that section 80 (1) of the Law of Property Act, 1945 did not make an estate of personalty liable that would not before the Act be liable but merely extended the liability to the realty.

The Court distinguished *Kirk* v. *Eustace,* [1937] A. C. 491, where an annuity in a separation payable to the wife "during her life" was held to continue after the husband's death. The distinction was based, first, on the absence of the words "during her life" and, secondly, upon a contrary intention appearing in the deed. Scott, L.J. said (at p. 115): "Unless the deed or written contract under consideration is a matter of common form—at least, in respect of the particular provision which falls to be considered—it is dangerous to seek to apply to it the judicial interpretation of another document unless that other document is so similar in its terms as to be almost identical: a principle applied to a separation deed by Bowen, L.J. (31 Ch. D. 524 at p. 529) in *Nicol* v. *Nicol.*"

It is thought that the problem of payments after the death of the husband is too frequently overlooked in separation deeds. The matter should be dealt with unambiguously.

(2 K. & E., p. 528, nn. (*g*) (*h*).)

Husband and wife—desertion—willingness to return.—Thomas v. *Thomas,* [1946] 1 A. E. R. 170 poses a dilemma for those drawing separation deeds, though the point involved was a different one. Here the issue was whether a wife who originally deserted her husband can put an end to the desertion by expressing her willingness to come back, so that if the husband does not accede he then becomes guilty of desertion. A Divisional Court (Merriman, P. and Hodson, J.) held that in the particular circumstances this was the effect of the husband's refusal to accede to his wife's request.

It is important to note that a husband is not always bound to take back an erring wife. The learned President said (at p 173): "I am dealing only with the class of case in which there is a mere separation, uncomplicated by misconduct other than withdrawal from cohabitation. We are not, for example, dealing with the case of a wife who has committed adultery, a case which stands in a peculiar position, nor are we dealing with the case of a husband who has driven his wife from home by cruel conduct. There, again, special considerations apply. We are dealing with a case where there is a mere separation, assumed to be unjustified on the part of the wife in the first instance."

This case with which the Court was dealing comes very close to the ordinary separation "by mutual consent." If the separation deed contains a non-molestation clause then it is practically impossible to get desertion as a ground for divorce. If it contains no such clause then either party can start desertion running against the other by asking to return to cohabitation. This seems to inflict some difficulty upon the party whose matrimonial home was in fact broken up by the other party. For instance, if a wife leaves her husband for two years and then asks to return, the husband will be guilty of desertion if he does not maintain his wife. At the end of a further three years the wife can petition for divorce and for maintenance on the decree absolute being made. The problem of providing for this sort of case demands some careful drafting and a good deal of prophetic foresight.

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2. *WILL CASES.*

By J. H. C. Morris, B.C.L., M.A., of Gray's Inn, Barrister-at-Law.

"During the present war".—Re Cooper (1945), 62 T. L. R. 65, is a useful decision on the meaning of the phrase "during the present war" in a will. The testator made a will in favour of his wife and two sons. By a codicil made in 1941 he substituted other provisions in the event of the death of himself, his wife and his two sons "during the present war". The testator and his wife died in July 1943 but his two sons were both living at the date of the summons. After the cessation of hostilities with Germany and Japan, the executors wished to know whether they could throw the codicil in the waste-paper basket, or whether they ought to keep

it in case the sons died before the peace treaties were signed. It was argued that the country must be either at peace or at war, and that it was not at peace until a treaty of peace had been signed and ratified. But Cohen, J., decided that the testator meant the effective end of hostilities, and not the conclusion of a treaty of peace, to be the end of the present war. He quoted from Lord Simon's speech in *Perrin* v. *Morgan,* [1943] A. C. 399, 412, to support the proposition that the Court is not bound, in construing a will, to give to each word its strict legal meaning. It is satisfactory to find that decision being quoted outside its immediate context in order to justify a more liberal approach to the construction of wills.

Provision for simultaneous deaths—deaths in air raid—gift of income to two persons for life and of capital after their deaths—destination of income after the death of one life tenant.—It is doubly unfortunate when people who make home-made wills get killed in air raids, for the resulting tangle often leads to legal difficulties. *Re Pringle* (1946), 62 T. L. R. 147 is another case of this type. By her will made in 1939 the testratrix gave all her property to her sister Christina. By a codicil made in 1941 she provided as follows: "In the event of the simultaneous death of the aforesaid Christina and myself I hereby bequeath the interest of my moneys to be divided between my two sisters Mary and Emily, after the deaths of these two named the capital to go to my nephew Robert." "Simultaneous death" was obviously a dangerous phrase for the testratrix to use, for a metaphysician would have told her that there is no such thing, time being infinitely divisible, and a lawyer would have told her that, whether metaphysically possible or not, simultaneity could never be proved. In February, 1943, the testratrix and her two sisters Christina and Emily were together in a house which was destroyed by a direct hit during an air raid, and their bodies were subsequently found close together on the debris. It was clear that the testratrix' mind was directed to covering the very event which in fact occurred, but she did not in terms say so. In spite of the somewhat subtle metaphysical and legal difficulties, Cohen, J., decided that the codicil took effect, because by "simultaneous death" the testatrix meant what an ordinary plain man would have meant.

The next difficulty was to decide what happened to Emily's share of the income during the rest of Mary's life. Emily was younger than the testatrix and consequently it was common ground that this question must be decided on the assumption that she survived the testatrix for a small fragment of time in accordance with section 184 of the Law of Property Act, 1925. Three alternatives were argued before the learned Judge: (a) that the income was payable to Emily's legal personal representatives; (b) that it was payable to Robert; (c) that it was payable to Mary. The argument for alternative (a) was somewhat technical and the learned Judge disposed of it first. The argument for alternative (b) was that "after the deaths of these two" meant after the deaths of each. The argument for alternative (c) was that it meant after the death of the survivor, and that there was an implied joint tenancy of the gift of income. Cohen, J., after some hesitation decided in favour of alternative (c), following *Re Hobson,* [1912] 1 Ch. 626, and *Re Ragdale,* [1934] Ch. 352. He was chiefly influenced by the fact that the first takers were of one generation (sisters), and on the death of the survivor the gift over was not to their children, but to another name.

One sister of the testatrix appeared in person. It must be very rare indeed for a construction summons to be argued by a litigant in person.

We hope she was satisfied by a decision which seems as sound and sensible from the point of view of the layman as it does from the point of view of the lawyer.

(Theobald 543, 426.)

Execution of special power—property "over which I shall have any disposing power at the time of my decease".—Re Welford's Will Trusts, [1946] 1 A. E. R. 23, is the latest addition to the somewhat artificial line of cases on whether the testator "intended" to exercise a special power of appointment. The testatrix had a special power to appoint among her children and grandchildren, exercisable by deed or will. By her will she provided as follows: "Subject to the payment of my just debts funeral and testamentary expenses I give devise and bequeath all my real and personal estate whatsoever and wheresoever and over which I shall have any disposing power at the time of my decease" to two named children. The testatrix made no other purported exercise of the power. Four points were taken by those entitled in default of appointment: (1) the word "and" before the words "over which", etc., were intended to introduce an additional quality to the property already mentioned; (2) the reference to payment of debts was inappropriate to property subject to a special power; (3) the word "appoint" was not used; (4) the words more properly referred to the possibility that the testatrix might become the donee of another power of appointment before she died. But Romer, J., taking the whole will and all the relevant circumstances into consideration, came to the conclusion that the power was exercised. It might have been otherwise if the gift had been in part to non-objects of the power, or if the power had not been created until after the date of the will. The authorities on this question are very difficult to reconcile, but it is submitted that the learned Judge's decision was correct.

(Theobald 214, 215.)

Gift to A and B during their lifetime—gift over after their death— If a testator gives property to A and B during their lives, with a gift over after their death, or after their deaths, what happens when one tenant for life dies? This is a familiar and notoriously difficult problem of construction upon which the authorities are hard to reconcile. According to one line of cases, of which *Re Hutchinson's Trusts* (1882), 21 Ch. D. 811, and *Re Errington,* [1927] 1 Ch. 421 are typical examples, the gift over takes effect on the capital representing the dead tenant for life's share of income. According to another line of cases (for instance, *Re Ragdale,* [1934] Ch. 352 and *Re Pringle supra*) the whole income is payable to the surviving tenant for life. The recent judgment of Romer, J., in *Re Foster* 62 T. L. R. 152 contains a valuable review of the authorities and is sure to be cited in future cases. The testator directed his residue to be equally divided between his brother and his four sisters "during their lifetime, but after their death to be evenly distributed between" his nephews and nieces. The testator had no other brothers and sisters except those mentioned in the will, so he could have no other nephews and nieces except the children of those five persons. It was held that on the death of the brother his share of income was divisible between his sisters, and that the gift to the nephews and nieces would not take effect until the surviving sister died. The learned judge summed up the effect of the authorities as

follows: (1) The rule in *Re Hutchinson's Trusts* applies in general when the gift to the second takers, being issue of the first takers, can fairly be construed as a gift to them per stirpes. (2) Its application is not imperative where the second takers are either not issue of the first takers at all or, being issue, the gift is a gift to them per capita. (3) The rule may be displaced by a sufficiently clear indication of intention on the part of the testator, to be gathered from the will as a whole, that the estate or fund in question, when passing to the second takers, is to pass to them as one entirety or mass. In the present case the gift to the nephews and nieces was a gift to them per capita, and the testator intended the estate to go over as an entirety and not in successive shares.

It is satisfactory to read that the learned judge would have come to exactly the same conclusion if he had been unaided by the authorities. Indeed the case is an excellent example of the proper use of rules of construction. The testator cannot have seriously contemplated the possibility that his brother and his four sisters would all die simultaneously. Therefore, the event for which he failed to provide was, humanly speaking, bound to happen. But his jejune and ungrammatical language afforded only the faintest clue to his intentions. The court of construction was therefore faced with the task of filling up a gap in the testator's will. In such circumstances no court could afford to neglect the assistance of analogy. By discovering the factors which weighed with former judges, the learned Judge was able to base his decision on far firmer grounds than if he had looked only at the will before him. On the evidence provided by the will, no one can say that the testator's intention was not carried out.

(Theobald 269, 426).

Perpetuity — Gift for education of descendants of A, B and C.— It may be doubted whether *Re Compton* (*No.* 2), [1946] 2 A. E. R. 117, was worth reporting, for in spite of all that could be urged in favour of the validity of the gift, the decision was really inevitable. The testatrix gave property to trustees on trusts "for ever" for the education of Compton and Powell and Montague children. She defined these three classes of "children" as the lawful descendants of three named persons. The Court of Appeal decided that the gift was not charitable because it lacked the essential element of being for the public benefit: [1945] Ch. 123, noted in Vol. 9 of the Conveyancer, page 152. The question whether the gift was void for remoteness was then argued before Romer, J. He decided that "children" meant descendants ad infinitum and not children living at the death of the testatrix; that the gift could not be upheld on the principle of *Cocks* v. *Manners* (1871), 12 Eq. 574, *Re Taylor,* [1940] Ch. 481 and similar cases, because the trustees had no such discretion to use up corpus as might have validated the gift; and that in the absence of such words as "so far as they legally can do so" the trust could not be held valid for 21 years only, and was therefore void.

Name and arms clause—condition to assume christian name. In *Re Parrott's Will Trusts* 62 T. L. R. 189 Vaisey, J. had to construe a very inartistically worded name and arms clause. The clause differed from the normal form in that the beneficiary was required to assume a christian name as well as a surname. He was required to do so by deed poll within six months of the testator's death or within six months of attaining his majority. The learned Judge held that the condition was void for

impossibility, because there are only two ways in which a christian name can be legally changed, namely (1) by the omnicompetence of an Act of Parliament, and (2) by the bishop at confirmation. The legality of (2) has been doubted, but the learned Judge vindicated Coke's opinion that such a change of christian name would be valid. His decision thus provides conveyancers with a useful modern authority in favour of the generally accepted view. He explained that the practice of changing a christian name at confirmation is said to have originated in the need for getting rid of *lascivia nomina,* that is, names possessing some improper connotation which had been incautiously given in baptism, or names which had subsequently acquired such a connotation.

The arms part of the clause was also void for impossibility because it required the beneficiary to assume the testator's crest and coat of arms "interspersed" with the crest and coat of arms of another family, and this was unknown to heraldry and incapable of performance.

It is interesting to speculate what the position would have been if the testator had simply required the beneficiary lawfully to assume the christian name without saying anything about a deed poll. The testator died a fortnight before the beneficiary's 14th birthday. Presumably the beneficiary had not then been confirmed, and so there would have been nothing to prevent him postponing his confirmation until his 21st birthday and then changing his christian name thereat. But what if the beneficiary had already been confirmed and had attained his majority before the testator died; would it have been impossible for him to have obtained a private Act of Parliament in six months? In *Re Knox,* [1912] 1 Ir. 288, a condition that the beneficiary should become a British subject within two years of the testator's death was held not to be impossible, although the Naturalisation Act, 1870, required five years residence as a condition of naturalisation, because a private Act of Parliament might have been obtained: a decision which, though probably correct in the circumstances, recalls Baron Martin's famous address to the penniless bigamist who could not afford a divorce. Nevertheless it would not have been difficult to convince a modern court that it is impossible to obtain a private Act in six monfhs. And Vaisey, J. was prepared to hold this clause void for uncertainty as well as for impossibility, because of the vagueness of the word "assume", and because nothing was said as to any subsequent user of the assumed name.

It must rarely happen that testators wish to compel a beneficiary to change his christian name. A study of this case suggests that though it is difficult to effectuate such a desire, it is not impossible.

(Theobald 520, 521).

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Notice to quit "on or before" a named date—validity.—In *Dagger* v. *Shepherd* (1945), 62 T. L. R. 143, the Court of Appeal has held that a notice given by a landlord to a tenant to quit "on or before" a named date is, if otherwise in accordance with the terms of the tenancy, valid: it is construed as an irrevocable notice to determine the tenancy on the named date, coupled with an offer to accept from the tenant a determination of the tenancy on any earlier date of the tenant's choice on which he should

in fact give up possession. This is valid, and the dictum of Lush, J., to the contrary in *Queen's Club Gardens Estates* v. *Bignell*, [1924] 1 K. B. 117, at p. 122, is overruled.

The judgment of the Court (Scott and Tucker, L.JJ., and Evershed, J.) was read by Evershed, J., who said, "The effect is that the landlord intimates his intention to treat the tenancy as coming to an end on the certain date named in the notice, giving to the tenant an opportunity of further altering his position at some earlier time if he elects so to do."

The Court of Appeal was careful to distinguish the cases of *Gardner* v. *Ingram* (1889), 61 L. T. 729, and *De Vries* v. *Sparks* (1927), 137 L. T. 441, in which the question was, not the effect of a notice to quit served by a landlord, but of a document addressed by a tenant to his landlord referring (in the one case) to an intention to surrender on the part of the tenant, and (in the other case) to an alleged agreement to surrender "on or before" a certain date. It will be seen that the use of the expression "on or before" in each of those documents left the other party in doubt as to the intention of the party serving the document. The same criticism could be made of a notice given by a tenant to his landlord of his intention to quit "on or before" a specified date: that would quite clearly leave the landlord in doubt as to the tenant's intention and, not being plain and unequivocal in its terms, would be a bad notice. If, however, a landlord's notice in such terms be given the construction indicated by the Court of Appeal, it indicates quite clearly to the tenant the date on which he is required to give up possession, and it is entirely up to the tenant whether he elects to avail himself of the option of giving up possession on the earlier date if he so chooses.

(Woodfall, 24th edition, pp. 969, 1327; Key and Elphinstone Vol. 2, p. 349).

Provision for determination of tenancy by notice "on or after" a named date—tenancy for term certain "and then quarterly subject to notice"—construction.—Two recent cases on the construction of leases which require consideration together are *Associated London Properties* v. *Sheridan* (1945), 62 T. L. R. 80, and *British Iron and Steel Corporation* v. *Malpern* (1945), 62 T. L. R. 149.

In *Associated London Properties* v. *Sheridan* a lease provided that "if on or after June 24, 1945, either party shall desire to determine this lease and shall give to the other of them two previous quarters' notice in writing of such desire . . . immediately upon the expiration of such notice this lease . . . shall cease and be void."

It was held by Wrottesley, J., that a valid notice could not be given until on or after June 24, 1945, and that a notice expiring on that date was bad. It will be observed that the phraseology used does clearly seem to indicate that it is the *giving* of the notice which is to be on or after the named date. Amongst other cases Wrottesley, J., referred in his judgment to *Gardner* v. *Ingram* (1889), 61 L. T. 729, and to *Re Lancashire and Yorkshire Bank's Lease*, [1914] 1 Ch. 522. In the former case there was a proviso enabling determination "after the expiration of the term of three years out of the term of five years hereinbefore mentioned by six calendar months' notice in writing. . . ." It was held that the notice could not be given until the three years had expired and a notice given to expire at the end of those three years was bad. It will be observed that this construction does not follow nearly so clearly

in that case as it does in the *Associated London Properties* case. In the *Lancashire and Yorkshire Bank* case there was a proviso that "After the expiration of the first three years of the term hereby granted, if the lessee shall desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such their desire . . . then and immediately on the expiration of such notice this present demise and everything herein contained shall cease and be void." Again it was held (by Eve, J.) that the language made it plain that the actual notice had to be given after the expiration of the first three years and that a notice given before then to expire at the end of those three years was bad.

In *British Iron and Steel Corporation* v. *Malpern* there was a lease for two years from June 24, 1943, "and then quarterly subject to three calendar months' notice on either side expiring on any quarter day. The landlord served notice on June 21, 1945 to quit on September 29, 1945. Lewis, J. held that the lease entitled the landlord to give a quarter's notice to determine after the expiration of two years provided that the notice became effective not earlier than three months after the expiration of that term, the lease was for two years, and then from quarter to quarter on a basis which necessitated at least one quarter after the end of the two years' term, but enabled the tenancy to be terminated at the end of that first quarter. The notice to bring about that termination could actually have been given any time up to June 28, 1945, but Lewis, J. held that on the construction of this particular agreement the material date to consider was the date of *expiration* of the notice, not the date it was given, and it did not matter that the notice in fact given was dated June 21, if it allowed (as this notice did) the tenancy to run for at least one clear quarter after the end of the two years' term.

Gardner v. *Ingram* and *Re Lancashire and Yorkshire Bank* were both cited to Lewis, J., and also *Herron* v. *Martin* (1911), 27 T. L. R. 481. He distinguished the two former cases, and pointed out that the facts he had to decide on were really indistinguishable from *Herron* v. *Martin*. In that case there was a tenancy for three years commencing March 25, 1907, and so on from year to year until the tenancy should be determined by either party giving to the other one year's notice in writing. Darling, J. held that a notice given on March 21, 1910 (*i.e.*, before the three years' term had expired) for March 25, 1911 (thus allowing the tenancy to run for one further year after the end of the three years) was good.

It does not appear that the *Associated London Properties* case was cited to Lewis, J.; that case had been decided only a month earlier and possibly was not at that date reported. The two cases are however clearly distinguishable upon the words of the agreements which came up for construction in each case, and illustrate the importance of construing carefully the actual words used in the particular agreement.

(Woodfall, 24th ed., pp. 958, 985; Key and Elphinstone, Vol. 1, p. 957).

War damage contribution—what is "rent".—In *Samuel* v. *Salmon and Gluckstein* (1945), 62 T. L. R. 28, there was a lease for 22 years in consideration of an annual premium of £600 for the first 21 years, and also the clear yearly rent of £600. A proviso for re-entry applied to the non-payment of rent but not to the non-payment of premium.

The question arose what proportion of the war damage contribution was "appropriate to the tenancy" for the purposes of section 50 of the War Damage Act, 1943, and this involved a determination of the proportion borne by the annual rent to the contributory value of the property. The expression used in section 50 is "the rent reserved", and Uthwatt, J. had to decide whether the so-called premium was part of the "rent reserved."

It was held that the annual premium was part of the "rent reserved", which therefore was £1,200 per annum and not £600 merely. Uthwatt, J. pointed out that the premium was payable periodically during the period of the lease, that the obligation to pay sums by way of premium ceased with the determination of the lease before its expiry by effluxion of time, and that there was a provision for apportionment in respect of any broken year. There was nothing in the transaction to relate the premiums to anything except the right to occupy the leased land; the premium was payable to the reversioner for the time being, showing the intention that the rent and the premium should march together. The differences between them—different days for payment and difference in the working of the forfeiture clause — were immaterial. Uthwatt, J. accordingly held that the payments by way of "premium" were intended to be, and in fact were, payments for the use of land, and although the parties had attached the label "premium" to them it was for the law to decide on the effect of the document whether the payments were rent. In his view the payments were part of the rent and were "rent reserved" within section 50 of the War Damage Act, 1943.

This case invites comparison with *Duke of Westminster* v. *Store Properties,* [1944] Ch. 129, noted in *The Conveyancer,* Vol. 8, at p. 180. There a payment described by the parties as "rent" was examined by Bennett, J. and found to be merely a payment due in respect of a collateral agreement for a licence to convert a house into office premises, which contained no demise; the payment was therefore held not to be "rent reserved" for the purposes of the War Damage Act. That case also illustrates the principles stated by Uthwatt, J. that it is for the law to decide on the effect of the document whether a payment there provided for is properly to be regarded as rent.

Comparison should also be made with *Rush* v. *Matthews,* [1926] 1 K. B. 653, a case under the Rent Restrictions Acts where a weekly payment described as "premium" was held to be really rent.

(Woodfall Supplement No. 4, p. 78).

Small Tenements Recovery Act, 1838—*"agent" for purpose of signing notice.*—It has been suggested that the note on *Bailey* v. *Hookaway,* [1945] 1 K. B. 266, in *The Conveyancer,* Vol. 9, at p. 233, does not clearly bring out the point that the Small Tenements Recovery Act, 1838, s. 1, only goes so far as to stipulate that the written notice there provided for is to be *signed* by the landlord or his agent as defined in section 7 of the Act; provided it is so signed, the landlord or his agent may "cause" the tenant to be served with the notice. It is therefore not quite correct to say that persons who are not "agents" within the definition given in the Act may not "give" or "serve" the statutory notice, and this has been pointed out by a reader. The expressions "give" and "serve" the notice are however used in the reports of the case, and it may be pointed out that, after the notice has been signed by the correctly authorised person, it is still the landlord or his authorised agent as defined in the Act who has to take the responsibility of "causing" the notice to

be served by someone on the tenant. The criticism that the landlord or agent need not actually " give " or " serve " the notice is therefore rather a technical one, as the responsible party signing and directing the service of the notice may without straining language be said to be " serving " it.

(Woodfall, 24th edition, p. 1116).

Rent Restrictions Acts—acceptance of rent after termination of tenancy.—Morrison v. *Jacobs,* [1945] K. B. 577, has confirmed what was believed to be the law regarding the continued acceptance of rent from a tenant holding over under the Rent Restrictions Acts and clarified the position beyond any doubt.

A tenancy for a term of years having expired, the tenant continued in possession, the house being one to which the Rent Restrictions Acts applied. The landlord continued to accept the rent week by week. It was contended that this continued acceptance of rent (which went on for two years) raised an inference of an implied tenancy from year to year, which needed to be determined before the landlord could bring an action to recover possession.

The Court of Appeal rejected this argument and re-affirmed the principle already laid down in *Davies* v. *Bristow,* [1920] 3 K. B. 428, and in *Shuter* v. *Hersh,* [1922] 1 K. B. 438, that the mere acceptance of rent after the end of the contractual tenancy does not create any new implied tenancy where the tenant has a right to hold over under the Rent Restrictions Acts. This principle applies equally whether the contractual tenancy which has come to an end is a periodic tenancy which has been terminated by notice to quit or a tenancy for a term of years which has expired by effluxion of time. In either case, if the tenant holds over under the Acts the mere receipt of rent thereafter by the landlord is not sufficient to raise an inference of any implied contractual tenancy.

The position is stated quite succinctly by Lawrence, L.J. After quoting section 15 (1) of the Act of 1920 which provides, "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy ", Lawrence, L.J. goes on to say, " Therefore a tenant who retains possession under the Act and so creates a statutory tenancy must observe the terms of the original contract. It follows that payment of rent, which is one of the terms of that original tenancy, cannot give rise by itself to a new contractual tenancy."

(Woodfall, 24th edition, p. 294; Rent Restrictions Guide, p. 60).

Rent Restrictions Acts—War Damage—whether a " new house " after reinstatement.—When a house has suffered extensive war damage and is later reinstated, it is a question of fact whether the house is still the same one or whether it is really a " new house " which has just come into existence. The question is an important one, for if the degree of rebuilding were so extensive, involving perhaps a considerable alteration in the design and lay-out, that it could no longer be predicated of the building that it was the same house as before, the result would be a new house for the purpose of the Rent Restrictions Acts, the standard rent of which would be the rent at which it was first let thereafter.

The point arose in *Eyre* v. *Haynes* (1945), 62 T. L. R. 63, where a house was of such rateable value on April 6, 1939, that it was outside the Rent Restrictions Acts, but after war damage was reassessed at a lower figure which, if this were the first assessment of a new house, would bring the house within the Acts. The county court judge had come to the conclusion that the damage was not enough to prevent the house remaining the same house as before. This being a question of fact upon which the judge had some evidence to find as he did, the Court of Appeal refused to disturb the finding, with the result that the house remained outside the Acts notwithstanding its reduced rateable value.

(Rent Restrictions Guide, p. 19).

Rent Restrictions Acts—Cottage in rectory grounds.—It has already been held that both a parsonage house and a cottage in the grounds which is "necessary for the convenient occupation" of the house within the meaning of section 59 of the Pluralities Act, 1838, are outside the Rent Restrictions Acts: *Bishop of Gloucester* v. *Cunningham*, [1943] 1 K. B. 101; *Brandon* v. *Grundy*, [1943] 2 A. E. R. 208; and *Culverwell* v. *Larcombe* (1945), 61 T. L. R. 385 (noted in *The Conveyancer* at p. 108, *supra*).

It does not follow from this that every house within the grounds of a parsonage house is automatically outside the Rent Restrictions Acts. It has to be shown that the cottage is "necessary" for the convenient occupation of the house, and the word "necessary" has to be construed in relation to the particular circumstances of the present time and to the particular parsonage house under consideration. This point arose in the recent case of *Neale* v. *Jennings* (1946), 62 T. L. R. 177, where the county court judge held that as the rectory itself, a large house of 22 rooms, was of sufficient size to accommodate the servants for whom possession of the cottage was desired, it could not be said that the cottage was necessary for the convenient occupation of the parsonage house. There being evidence upon which the judge could so find, the Court of Appeal would not disturb his finding, and the result was that the Rent Restrictions Acts did apply to this particular cottage notwithstanding its situation within the rectory grounds.

(Rent Restrictions Guide, p. 74).

Rent Restrictions Acts—sub-tenant to whom the premises "have been lawfully sub-let"—waiver of breach.—In *Norman* v. *Simpson* (1945), 62 T. L. R. 112, a majority decision of the Court of Appeal has given much food for thought on the subject of what is a "lawful sub-letting."

By section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is provided that "where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

A statutory tenant of a house holding over by virtue of the Acts sub-let the house in breach of covenant, no application having been made for the landlord's consent as required by the original tenancy agreement. The landlord became aware of the sub-letting but raised no objection,

and continued to accept the rent for some four years thereafter. Notice to quit was then given to and accepted by the tenant, but the sub-tenant held over relying on section 15 (3) of the Act of 1920. The plaintiff was a purchaser of the freehold from the original lessor, who now sought to recover possession from the sub-tenant.

A majority of the Court of Appeal, consisting of Scott and Morton, L.JJ., decided that a sub-tenant was entitled to the benefit of the sub-section if the head lessor had no subsisting right of re-entry immediately before the head tenancy came to an end. They therefore held that "the defendant is, in our judgment, protected by the section because Miss Irwin (the lessor) accepted rent from Mr. Conibear (the tenant) with full knowledge of the sub-letting and thereafter her right to re-enter was gone."

du Parcq, L.J. dissented from this judgment of the majority holding that although by accepting rent from the tenant the then landlord acknowledged the continuance of the tenancy and waived "the common law right of forfeiture arising from the breach," she did not thereby acknowledge that the sub-letting was lawful. On this footing the sub-letting was not a lawful one within section 15 (3) of the Act of 1920 and when the intermediate tenant's interest came to an end the sub-tenant holding over became a mere trespasser.

Unless later overruled the majority decision will, of course, stand as the judicial interpretation of section 15 (3), though it does appear to be open to several criticisms. On the face of it it is not easy to see why the mere acceptance of rent with notice of the breach should be considered to render lawful a sub-letting which was in breach of covenant. It has never, so far as the writer is aware, been suggested that the right of action for damages for breach of covenant is waived by subsequent acceptance of rent. It is the right of re-entry for forfeiture which is waived, for the receipt of rent subsequently due acknowledges that the tenancy has a continued existence notwithstanding the breach giving rise to a right of forfeiture. Not the least of the difficulties in the way of understanding this case is the fact that the report nowhere suggests that there was any clause giving a right of forfeiture for breach of covenant in this case, and indeed it is understood that the tenancy agreement in this case in fact did not contain any proviso for re-entry. Yet even du Parcq, L.J., in his dissenting judgment proceeds upon the assumption that there was a right of forfeiture in this case.

A point that must not be lost sight of is that in *Norman* v. *Simpson* the tenant who sub-let in breach of covenant was at all material times a mere statutory tenant under the Rent Restrictions Acts. His lease had come to an end before he effected the sub-letting. Under section 15 (1) of the Act of 1920 his status was that of a statutory tenant who was required, so long as he retained possession, to observe and was entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same were consistent with the provisions of the Acts. This placed him under an obligation not to sub-let without licence, as stipulated in the original contract of tenancy. Now suppose the lease had contained a proviso for re-entry. Would this have been imported into the statutory tenancy? The Court of Appeal seem to have assumed that it would. It may, however, be suggested, that it is an inescapable consequence of the decision of the House of Lords in *Regional Properties* v. *Oxley*, [1945] A. C. 347, that the proviso for re-entry would *not* be imported into the statutory tenancy. In that case the House of Lords had to consider whether a special stipulation in the original contract allowing an abatement from the rent in certain circumstances was carried

over into the statutory tenancy, and it was held that as the Acts laid down their own rules as to the rent that could be charged to a statutory tenant, based upon the "standard rent" and "permitted increases," any term of the original contract which regulated the amount of the rent to be paid was inconsistent with the provisions of the Acts and therefore was not carried over into the statutory tenancy: see the discussion of that case in *The Conveyancer* at p. 111, *supra*. Now the Acts not only lay down rules as to the rent which may be charged to a statutory tenant, they also lay down rules as to the conditions under which an order may be made against him for recovery of possession, and it is submitted that the principle laid down in *Regional Properties* v. *Oxley* applies equally here, and that no term of the original contract which purports to decide how and when the tenant may be required to give up possession (save in so far as the length of notice to be given *by the tenant* is by the very words of section 15 (1) imported into the statutory tenancy) is carried over into the statutory relationship, all such provisions being inconsistent with the provisions of the Acts. Upon this view a proviso for re-entry for breach of covenant is just as inappropriate to a statutory tenancy as is a proviso for breaking the lease at the end of seven years.

The above discussion will serve to show that *Norman* v. *Simpson* raises a number of points of difficulty, not all of them apparent on the surface; perhaps some judicial clarification of the issues involved may be hoped for at a future date.

(Woodfall, 24th edition, p. 295, Rent Restrictions Guide, p. 63).

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4. *INCOME TAX CASES.*

By LEONARD STEIN, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Income tax—surtax—payment out of capital of estate before ascertainment of residue.—The decision of Macnaghten, J. in *C. I. R.* v. *Cunard's Trustees* and *C. I. R.* v. *McPheeters* (see *The Conveyancer*, Vol. 9 p. 236) has been reversed by the Court of Appeal, [1946] 1 A. E. R., 159. The question at issue was whether certain payments made to a beneficiary under a will out of the capital of the estate before the residue had been ascertained fell to be treated as income in the hands of the recipient. The testatrix had, by her will, devised certain freehold property to M., who was also given a life interest in the residue. The will further provided that if in any year the income of the residuary estate should not be sufficient to enable M. to live in the same degree of comfort as during the life of the testatrix, the trustees should have power "to apply such portion of the capital of my residuary estate by way of addition to the income as they in their absolute and uncontrolled discretion may think fit, any capital so applied to be treated as an additional bequest" to M. The testatrix died in January, 1925. Administration was completed, and the residue ascertained, in February, 1940. Between these dates various payments out of capital were made to M. under the above-mentioned provisions of the will.

The question to be decided was whether the executors and trustees were assessable in respect of these payments under Rule 21 of the All Schedules Rules, and whether they entered into the computation of M.'s total income for the purposes of surtax. Differing from Macnaghten, J., the Court of Appeal was unanimous in answering these questions in the affirmative. The payments, it was held, were not made to M. by virtue of or in relation to her life interest in the residue of the estate, but by virtue of a discretion exercisable under express provisions of the will, and clearly exercisable from the death of the testatrix. Hence, nothing turned on the fact that the payments were made before the net residue had been ascertained. As to whether they had the character of income, it was clear that their purpose was to supplement the income of M., and, if they reached M. as income, it was immaterial that they came out of capital. It was equally immaterial that they were not claimable by M. as of right but were made in exercise of a discretionary power. This did not make them voluntary payments so as to take them out of Case III of Schedule D, and, since they were capable of recurrence, it made no difference that they would not necessarily be repeated year by year and that they might (as, in fact, they did) vary in amount. In discussing these points in his judgment, the Master of the Rolls expressly approved Lord Finlay's decisions in *Brodie's Trustees* v. *C. I. R.*, (1933), 17 T. C. 432, and *Lindus and Hortin* v. *C. I. R.*, (1933), 17 T. C. 442. On these grounds, tne Crown's appeal was allowed.

It was not strictly necessary to consider the Crown's alternative contention that the payments were within the scope of section 30 of the Finance Act, 1938, by which sums paid, while an estate is under administration, to a person having " a limited interest " in the residue of the estate, being payments " in respect of that limited interest ", are to be deemed to have been paid to that person as income. M. clearly had a " limited interest " in the residue, but the Court expressed the view that the payments were not, in the relevant sense, " in respect of that limited interest ", since the sums in question were paid to her, not in relation to her life interest in the residue, but in exercise of a discretionary power expressly created by the will.

Income tax—wife's income from foreign possessions—husband abroad, and wife in United Kingdom—Income Tax Act, 1918, *All Schedules Rules, Rule* 16—The obscure provisions of Rule 16 of the All Schedules Rules, which deals with the tax position of married women, have given rise to a series of decisions, of which the latest is that of Macnaghten, J., in *Nugent-Head* v. *Jacob,* [1945] W. N. 226. An Englishman had married an American wife, who had a substantial income in her own right from property in the United States. The husband and wife shared a common home in the United Kingdom until 1939. The husband then joined the army and, in 1941, was sent overseas. The wife remained in the United Kingdom. Rule 16, above, begins by laying it down that " a married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried ". But this is followed by two provisoes. By the first proviso, the profits of " a married woman living with her husband " are to be deemed to be the profits of the husband. The second proviso is concerned with " a married woman living in the United Kingdom separate from her husband ", and requires that, in respect of " any allowance or remittance from property out of the United Kingdom ", she shall be " charged as a *feme sole,* if entitled thereto in her own right, and as the agent of her husband, if she receives the same from or through him. . . . "

In *Nugent-Head's case*, above, the view taken by the Revenue authorities was that, in so far as the income was not remitted to the United Kingdom, the husband was assessable under the first proviso to the Rule, on the footing that the wife was a married woman living with her husband, but that so far as the income was remitted to the United Kingdom, the wife was assessable under the second proviso, on the footing that she was " a married woman living in the United Kingdom separate from her husband ". This involved the proposition that a wife, though " living with her husband ", can also be " living . . . separate from her husband ", or, to put it more rationally, that the second proviso is to be construed as a qualification of the first, so that the second proviso cuts down the effect of the first in the case of one class of married women living with their husbands, *viz.* those who, for whatever reason, are for the time being not sharing a common home. Commenting upon the mysteries of Rule 16, the learned judge described the case before him as an illustration of " the urgent need for the simplification and clarification of the law relating to income tax ". On the question at issue, after discussing the three judgments in *Derry* v. *C. I. R.*, (1927) 13 T. C. 30, he came to the conclusion that the Crown's contention failed. Holding that the second proviso referred to a case in which the spouses had separated in the ordinary sense of that word, he decided that, on the facts of Mrs. Nugent-Head's case, that proviso did not apply to her and that the assessment on her was, accordingly, incompetent. It appears to follow from the decision, not only that in the second proviso the words " separate from her husband " must be given the meaning attached to them by the learned judge, but also that in the first proviso the expression " living with her husband " may apply where the parties are not living in the same place and is not to be taken literally as connoting the actual occupation of a common home.

Surtax—Gift of securities by wife to husband—Compromise of action relating to revocation of gift—Income arising before date of compromise.— Though the point was short and simple, the decision in *Shenley* v. *C. I. R.* [1945] Taxation Reports 317, may usefully be noted. A wife made a gift to her husband of valuable securities and instructed the Bank in whose custody they were to hold them to the husband's order. The spouses subsequently quarrelled and separated. In March, 1939 the wife revoked—or purported to revoke—the gift, and informed her husband to that effect. She then instituted an action against the Bank, joining the husband as a defendant. In the end, the parties came to terms, and the compromise arrived at was embodied in an Order of the Court. This was to the effect that the securities should be divided equally between the husband and the wife, and that there should be a like division of the income arising from the securities since April 5, 1939. The question at issue in the tax appeal was whether the wife was assessable in respect of one-half of the income as from April 5, 1939. Macnaghten, J. held that she was, distinguishing *Stanley* v. *C. I. R.* (1944), 26 T. C. 12, on which the wife had sought to rely, on the ground that there the question was whether the happening of a certain event had the effect of creating retrospectively a vested interest in income arising before its occurrence, whereas in this case the effect of the compromise embodied in the Order of the Court was that the revocation of the gift in March, 1939 was, as to one-half of the securities, to be treated as valid and effective.